

No. 14329

**United States
Court of Appeals**
for the Ninth Circuit

RAYONIER INCORPORATED, a Corporation,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

**Appeal from the United States District Court for the
Western District of Washington,
Northern Division.**

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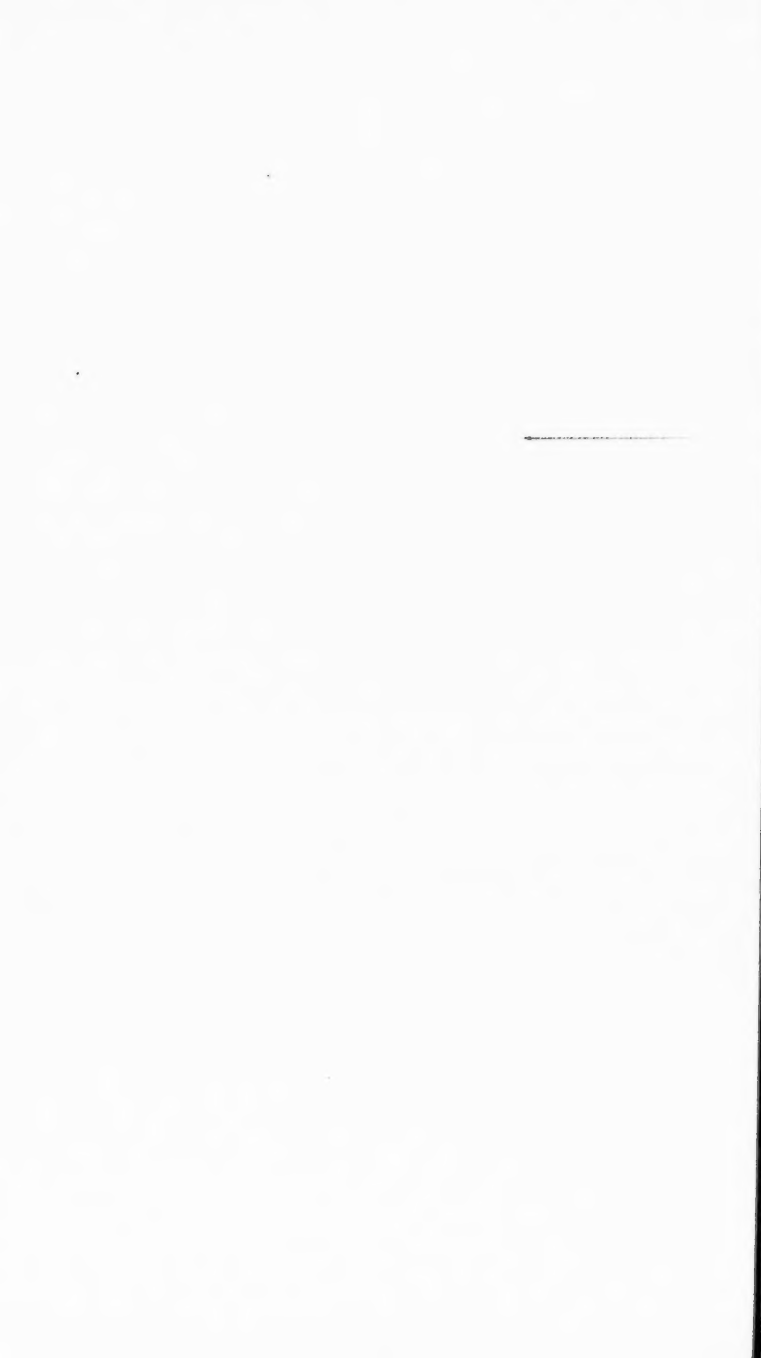
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In the District Court of the United States for the
Western District of Washington, Northern
Division

No. 3533

RAYONIER INCORPORATED, a Delaware Cor-
poration,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

AMENDED COMPLAINT

Plaintiff, Rayonier Incorporated, for cause of action against defendant, United States of America, complains and alleges as follows:

I.

Jurisdiction of the above-entitled court for this action is claimed and acquired under Title 28 of the United States Code, Sections 2671 to 2680, inclusive, commonly known as the "Federal Tort Claims Act," the United States of America being defendant, and Title 28 of the United States Code, Section 1346; and is also claimed and acquired because the acts and omissions herein complained of and the damage to plaintiff's property herein described occurred within the Western District of Washington, Northern Division.

II.

Plaintiff is now and was at all times herein men-

tioned a corporation duly organized and existing under the laws of the State of Delaware and authorized to do business in the State of Washington, and all license fees and other charges due the State of Washington from plaintiff have been paid. Plaintiff has places of business in the State of Washington, among other places, at Seattle, King County, Washington, and Port Angeles, Clallam County, Washington, within the Northern Division of the Western District of Washington of the above court. The acts and omissions herein complained of and the property damage herein described occurred in Clallam County, Washington, within the jurisdiction of the above court.

III.

Plaintiff's principal business is the manufacture of pulp, and in connection therewith it owns or has cutting contracts with respect to extensive stands of timber, owns extensive areas of lands having young and growing timber, conducts, both directly and through independent logging contractors, extensive logging operations, and owns and operates pulp mills, logging railroads, logging camps, telephone systems, truck roads and other facilities, both within Clallam County, Washington, and in other places in the State of Washington, principally on what is known as the "Olympic Peninsula." Included in its ownerships at all times herein mentioned were the land and timber particularly described in Exhibits A and B attached hereto and hereby made a part hereof, the lands described in Exhibit A com-

prising approximately 8,698 acres, and the lands described in Exhibit B comprising approximately 1,672 acres.

IV.

At the times herein referred to plaintiff was party to two so-called "Timber Sales Contracts" with the Department of Agriculture, Forest Service, of the United States of America, under the terms of which plaintiff has the right and obligation to purchase, cut and pay for certain timber owned by defendant. Said Timber Sales Contracts are identified as follows:

(a) No. 17345—Date of sale, May 11, 1948, covering about 720 acres in the Calawah River Watershed in Townships 28 North, Range 11 West; 28 North, Range 12 West; 29 North, Range 11 West; 29 North, Range 12 West, Clallam County, Washington.

(b) No. 22912—Date of sale, June 5, 1951, covering about 299 acres in the Sitkum River Watershed in Townships 28 North, Range 12 West and 29 North, Range 12 West, Clallam County, Washington.

On September 20, 1951, there remained uncut timber which plaintiff had the right and obligation to purchase, cut and pay for under said Timber Sales Contracts.

V.

At the times herein referred to the defendant owned extensive lands and timberlands in Clallam

County, Washington, many of which are adjacent to or in the general vicinity of plaintiff's lands described in Exhibits A and B, and also were the site of, adjacent to or in the general vicinity of the place where the acts and omissions herein complained of occurred. Many of said lands and timberlands owned by the defendant are administered by the Department of Agriculture, Forest Service, of the United States of America. Much of the timber so administered by the Forest Service is held, managed, operated and administered upon to be sold to private parties for cutting for commercial and industrial purposes, and for pecuniary gain and profit to defendant, and its lands herein described on which fire originated were and are held for purpose of pecuniary gain and profit to defendant.

VI.

A large area (herein called the "Forest Service Protective Area"), which embraced and included all of the lands referred to in this complaint, and extending from a North-South line located east of the lands herein referred to, westerly to a North-South line just east of the town of Forks, Clallam County, Washington, had, prior to August 6, 1951, been established by agreement between defendant, through the Forest Service, and the State of Washington. By said agreement the Forest Service agreed to protect certain lands, including plaintiff's lands and the 1600-acre area hereinafter referred to, against fire and to take immediate vigorous action to control all fires originating on or threaten-

ing such lands, regardless of the type of forest growth or cover being burned or threatened. Said agreement also provided, among other things, as follows:

“9. Nothing herein contained shall be understood to impair the right of the United States, the State of Washington, or any person or corporation to recover the costs of suppression and damages on account of fires resulting from the negligent, wilful, or unlawful act of said forest landowner or timber operator within said protective units or any other person or corporation, or to impair any other rights of similar nature under the Washington Forestry Laws, under the Federal laws, or under general law.”

Said agreement between defendant and the State of Washington was in effect at all times herein mentioned. Plaintiff, in common with most other owners and operators of timber and timberlands in the area, knew at all times herein mentioned and prior thereto of the establishment and existence of said Forest Service Protective Area and, in general, of the duties and obligations of the Forest Service within the Forest Service Protective Area.

VII.

As one owner and operator of lands and timber within the Forest Service Protective Area, including all of defendant's lands referred to in this complaint, it was the duty of defendant, under the law

and statutes of the State of Washington, not to do any act which would expose any of the forests or timber within said area to the hazard of fire, to abate any hazard, such as inflammable debris likely to further the spread of fire, on defendant's lands, and to make every reasonable effort to control and extinguish the fire which occurred on defendant's lands as hereinafter set forth. The following statutes of the State of Washington were in force and effect at all times herein mentioned, namely: R. C. W. §76.04.050 (Rem. Rev. St. §5818); R. C. W. §76.04.370 (Rem. Rev. St. §5807); and R. C. W. §76.04.380 (Rem. Rev. St.—1945 Suppl. §5806).

VIII.

At all times herein mentioned Sanford M. Floe was employed by the defendant as District Ranger for the Forest Service for the Soleduck District, which district included the Forest Service Protective Area. The District Ranger and his assistants and subordinates had numerous duties, such as and including the carrying out of forestry practices, observation and inspection of road construction and logging operations in timber being purchased from defendant, checking on hunters, fishermen, campers and recreationists, giving information to the public and to persons interested in the district and its various features and activities, and, in general, acting as caretakers of defendant's land. As such caretakers, the District Ranger, his assistants and subordinates had the duty to see that defendant's

lands were maintained and kept in the manner required of such landowners by the law and statutes of the State of Washington. In the performance of said duties they were supposed to inspect and patrol defendant's lands and other lands within the Forest Service Protective Area, to discover, abate and eliminate conditions thereon which constituted fire hazards, to watch for the outbreak of fire and, when fire occurred within said area, to fight and use every reasonable effort to control and extinguish the same and to supervise, direct and control activities in fighting and suppressing such fires. At all times herein mentioned, L. J. Evans was employed by the defendant as District Assistant Ranger of the Forest Service for the Soleduck District, and he was immediately subordinate to District Ranger Floe and assisted Mr. Floe in the performance of his duties. Said District Ranger and his District Assistant Rangers were authorized and empowered to employ, hire, rent and use all men, equipment, tools and materials reasonably necessary to fight, suppress and extinguish fires within the Forest Service Protective Area. In order that they might more effectively carry out their several duties described in this paragraph and elsewhere in this complaint, District Ranger Floe, District Assistant Ranger Evans and other subordinates of Floe were, as were some employees of private timber owners in the area having similar duties, Washington State Fire Wardens. As State Fire Wardens, they had the power and authority to summon and impress help in the prevention, suppression and

control of forest fires. Plaintiff, in common with other owners and operators of timber and timberlands in the area, knew at all times herein mentioned and prior thereto of the aforesaid duties, authority and powers of Messrs. Floe and Evans and their subordinates. ●

IX.

The acts and omissions of defendant's employees herein described or complained of were within the scope and course of their employment by the defendant and occurred while they were performing their duties as employees of the defendant. Their negligence was the negligence of defendant.

X.

In the areas referred to in this complaint virtually no rain had fallen for four months prior to August 6, 1951, and very little rain fell after that date until after September 20, 1951. Because of the weather conditions the areas in which the fires referred to in this complaint occurred were extremely dry and there was acute fire hazard. Dry winds were not uncommon in the Soleduck River valley, within which the fires herein described originated. Such winds not only added to the dryness and combustibility of fuels, but also greatly increased the danger and hazard of the spread of fire. The facts and circumstances described in this paragraph were known or, in the performance of their duties, should have been known to District Ranger Floe and District Assistant Ranger Evans and other employees of the Forest Service in the Soleduck District.

XI.

At all times herein mentioned and for a number of years prior thereto defendant owned and had control of and free and unrestricted access to the following described lands, including the right of way of the Port Angeles Western Railroad across said lands, to wit: The North half of the Southeast quarter ($N\frac{1}{2}$ of $SE\frac{1}{4}$) and Government Lots Seven (7) and Eight (8), in Section Thirty (30), Township Thirty (30) North, Range Ten (10) West of the Willamette Meridian, and Lot Eleven (11) and the Southwest quarter of the Southwest quarter ($SW\frac{1}{4}$ of $SW\frac{1}{4}$) of Section Twenty-five (25), Township Thirty (30) North, Range Eleven (11) West of the Willamette Meridian, all in Clallam County, Washington. Upon said described lands there were railroad tracks of the Port Angeles Western Railroad over which were regularly operated locomotives and logging trains by said railroad. The locomotives and other equipment which said railroad operated over said tracks were, in a number of respects, defective and deficient, were without adequate or proper spark arresters, were poorly maintained and, not uncommonly, threw sparks both from the stacks and from friction occurring in various parts of the locomotives and other equipment and in their contact with the ground or rails over which they ran. The legal subdivisions above described and the right of way through said legal subdivisions were, on August 6, 1951, and for a number of years prior thereto had been covered with trees of various sizes, both standing and down, accumulations of rotten

ties, logging and land clearing debris, inflammable growing grasses and bushes, and many of the ties supporting the railroad tracks were also rotten. All the facts and circumstances described in this paragraph were known, or in the exercise of their duties should have been known, to District Ranger Floe, District Assistant Ranger Evans and other employees of defendant. Defendant could have abated or caused to be abated prior to August 6, 1951, the above-described conditions and practices on the above-described lands and right of way, but failed to do so.

XII

Near the hour of noon on August 6, 1951, approximately six fires occurred on and in the vicinity of the right of way across the above-described legal subdivisions, which fires burned simultaneously and were caused by a passing train of the Port Angeles Western Railroad. Said train did not have a following speeder or other equipment with men to watch for fires which might be caused by the train, as required by the statutes of the State of Washington. It was common practice of said Railroad not to have its trains followed up by speeder or other equipment with men watching for fires. Prior to August 6, 1951, the defendant and District Ranger Floe had called the attention of the Port Angeles Western Railroad to its failure to observe the practices above stated and to its operation of deficient and defective equipment, and had requested said Railroad to correct the same and observe fire

prevention practices. The Railroad failed and neglected to do anything about it. On and in the immediate vicinity of the above-described legal subdivisions and of the fires caused as aforesaid were stands of young growing timber, and within a short distance were stands of older and mature timber. The defendant and its employees had the right and as owner of said land, the duty to go upon the above-described lands and the railroad right of way to take any action necessary or proper to abate conditions and practices thereon which constituted a fire hazard, but they failed and neglected to take any such action. All of the facts and circumstances described in this paragraph were known or, in the exercise of their duties, should have been known to District Ranger Floe, District Assistant Ranger Evans and other employees of the defendant.

XIII.

Shortly after commencement of the fires referred to in paragraph XII, District Ranger Floe and his subordinates were notified of said fires and he then dispatched six men to extinguish the same. The men so dispatched took with them only light hand tools. They did not take with them a portable radio. More men, tools and equipment and radio equipment to permit constant communication with the District Ranger Station were available and could have been dispatched and sent to the scene of the fires.

XIV.

Upon being informed of the fires referred to in paragraph XII, District Ranger Floe and his

subordinates immediately assumed, took and exercised exclusive supervision, direction and control of all activities in connection with the fighting and suppression of the fires, and at all times thereafter, through and including the times referred to in this complaint, continued to and did assume, take and exercise exclusive supervision, direction and control of the fighting and suppression of all fires referred to in this complaint. Plaintiff, in common with other owners and operators of timber and timberlands in the areas referred to in this complaint, knew of the facts described in this paragraph and relied upon District Ranger Floe and his subordinates to continue to carry on said activities at all times referred to in this complaint.

XV.

The men dispatched as aforesaid failed to extinguish one of the fires originating as stated in paragraph XII and said fire spread until it covered an area of approximately 60 acres. It was contained within said area by late afternoon on August 6, 1951, after additional men and equipment had been brought to the scene of the fire. During the night of August 6 and August 7, a few men were left at the scene of the fire, but a larger crew to resume the fire fighting did not report for duty until 7 o'clock a.m. on August 7, which is the hour at which they were directed by District Ranger Floe or his subordinates to report. Daylight occurred on August 7 at about 4 o'clock a.m. Large crews of men and much equipment could and would

have reported for duty to commence fire fighting at daybreak had the District Ranger or his subordinates so instructed them. It is common knowledge in the timber industries and was known or should have been known by District Ranger Floe and his subordinates that one of the most effective hours to fight fires such as those above described is the period immediately after daybreak.

XVI.

Had fire fighting been commenced at daybreak on August 7 and had additional men, tools and equipment been employed in fighting said fire, the same could have been completely controlled on the morning of August 7, 1951, and the spread of the fire and damage hereinafter referred to could and would have been avoided, which facts District Ranger Floe and his subordinates knew or should have known.

XVII.

At about 2:30 o'clock p.m. on August 7, 1951, the fire above described broke through or jumped over the lines within which it had theretofore been contained and spread in Southeasterly, Southerly and Southwesterly directions over an area of approximately 1,600 acres (which is hereinafter sometimes referred to as the "1600-acre area"). Said fire was contained and under control by about August 11, 1951. Thereafter and until the early morning of September 20, 1951, the fire continued mostly in smoldering form, but during said period there was no uncontrollable fire within the 1600-acre area.

XVIII.

In the general vicinity of the land referred to in this complaint the forest industries provide the primary occupation and means of livelihood of the residents, and protection and preservation of the forest is a matter of first concern, both to residents of the area and to the timber and mill owners and operators. As a consequence, most men willingly and voluntarily respond to calls for assistance in fighting fires and owners of equipment willingly and voluntarily furnish their equipment when called for to fight fires, regardless of whether such call is made by private or public timber and land owners or operators. Similarly, timber owners and operators knew what men and equipment were available to fight fires and how to reach them if necessary, and on appropriate occasion did call upon them. A Fire Suppression Plan for the Forest Service Protective Area had previously been adopted and approved by the Supervisor of the Olympic National Forest to be followed and employed by District Ranger Floc and his subordinates. Said plan was in effect at all times herein mentioned. Said plan included, among other things, a list of privately employed men who and privately owned equipment which were available to fight and suppress any fire within the Forest Service Protective Area, and the method of getting such men and equipment promptly to the scene of the fire. Said men and equipment were available at all times herein mentioned. Said Fire Suppression Plan contemplated that the District Ranger and his subordinates would call upon and use all men

and equipment necessary to suppress and extinguish all fires within the Forest Service Protective Area as promptly as possible, and as caretakers of defendant's lands it was one of the duties of the District Ranger and his subordinates to call upon and use such men and equipment. The defendant did not own, maintain or operate a fire department or fire-fighting organization, as such, in the Soleduck District, but, just as other owners and operators of timber and timberslands in the area, had men and equipment available to fight fires and knew where additional men and equipment available to fight fires could readily and quickly be obtained.

XIX.

In addition to the men and equipment described and listed in the Fire Suppression Plan, there were hundreds of other privately employed men and a great deal of other privately owned equipment in the vicinity which were available and could have been used to fight, suppress and extinguish fires and do mop-up work on August 6 and 7, 1951, and thereafter on and about the 1600-acre area, the quantity of equipment and number of men being practically limitless so far as fire suppression and mop-up activities in the area were concerned. The men referred to in this paragraph and in the immediately preceding paragraph would have responded promptly, and the equipment referred to in this paragraph and in the immediately preceding paragraph would have been made immediately available to the Forest Service and District Ranger Floe and

his subordinates on their request. Said facts were known or should have been known to District Ranger Floe and his subordinates.

XX.

District Ranger Floe and his subordinates failed to summon, use and employ men, equipment and materials available to them under the Fire Suppression Plan and otherwise when and in the numbers and quantities that they should have or which said Plan contemplated or which they had power and authority to summon, use and employ, and which they knew or should have known would have been required in order to suppress and extinguish the fires above described and which prudence and due care dictated they should have used and employed.

XXI.

The 1600-acre area, including the westerly portion thereof, contained a great deal of logging debris, stumps, logs and wood chunks. Within and near the westerly boundary of the 1600-acre area was a so-called "landing" which had previously been used in logging operations as a point to which logs were yarded and loaded onto trucks. Said landing contained a great deal of logging debris, including logs, chunks, bark, limbs and dead and rotting vegetation. Said landing was largely covered by dirt in order to make the surface usable, but the accumulations underneath the dirt were such as to permit burning of said debris and the entry of air into that debris.

Said landing is located at an altitude of approximately 2,000 feet on a ridge which was exposed to winds which could sweep across said landing and onto nearby slash and timber areas. During all times herein mentioned it was common knowledge and was known to District Ranger Floe and District Assistant Ranger Evans, or in the course of their employment should have been known to each of them, that smoldering fires burn in such debris, logs, stumps, chunks and bark, and in accumulations thereof such as existed in said landing and elsewhere in the 1600-acre area, for long periods of time when no flames are visible, and that such smoldering fires may be whipped into flame and sparks and burning materials carried from such debris and other forest materials by the wind. The landing above referred to and the greater portion of the westerly part of the 1600-acre area were in close proximity to unburned areas on which there were slash, young growth and mature timber, all of which facts were known or should have been known to District Ranger Floe and District Assistant Ranger Evans and their subordinates.

XXII.

Two rivers, the Soleduck and Camp Creek, run through and are immediately adjacent to the 1600-acre area and the areas to which the fire was confined on August 6 and 7, 1951. Each river had more than enough water to supply all conceivable requirements of water in fighting the fire prior to September 20, 1951. Water could be procured from

both rivers in fighting fire, through pumps and hoses directly to the fire, and through tank trucks and pack cans by which water could be hauled or carried to all parts of the area.

XXIII.

Usable and safe roads existed during all times herein mentioned, both within the 1600-acre tract and in the lands adjacent thereto, to provide access to and egress from all parts of the 1600-acre area. Also, the tracks of the Port Angeles Western Railroad served the area and were available for use with railroad equipment.

XXIV.

For several days immediately prior to September 20, 1951, the temperature in the areas referred to in this complaint had been warm; the weather forecasts (including those forecasts made by the U. S. Weather Bureau) were for higher temperatures, decreasing humidity and northeasterly winds. It is common knowledge in the vicinity and was known or should have been known by District Ranger Floe and District Assistant Ranger Evans that northeasterly winds in that vicinity during that time of year were dry winds, usually accompanied by warm temperatures and low humidity. Messrs. Floe and Evans knew, or in the course of their duties as District Ranger and District Assistant Ranger should have known, of the aforesaid weather forecasts and of the temperatures and humidity, and that the weather conditions aforesaid made various

fuels in the area very susceptible to fire and the spread of fire.

XXV.

For many miles westerly and southerly from the 1600-acre area there are extensive and unbroken stands of timber, cutover lands and lands with young forest growth on them, having a value of many millions of dollars. Messrs. Floe and Evans knew, or in the performance of their duties should have known, that any fire in the 1600-acre area would endanger and jeopardize said timber and timberlands, and that if fire broke out in that area accompanied by Northeasterly winds the fire would spread rapidly to the west and south, would become beyond control, would continue for great distances and would cause great damage.

XXVI.

During the period from August 11, when the fire in the 1600-acre area was contained and controlled, until September 20, 1951, fires continued to smolder in the debris, bark, logs, stumps, wood chunks and the landing above referred to, which fact was known or should have been known by Messrs. Floe and Evans and their subordinates on the job. During that period District Ranger Floe and District Assistant Ranger Evans supervised and directed operations on the 1600-acre area, but failed to extinguish all fire in the area, including fires smoldering as aforesaid. During said time Messrs. Floe and Evans employed only a few men and a few items of equipment and tools on and about the 1600-acre

area, although they had the power and authority, and at all times were able, to use many more men and a great deal more equipment and tools in such operations, and they could have completely extinguished all fire in the 1600-acre area, and especially in the westerly portion thereof which was in close proximity to unburned slash, timber and other inflammable materials. They likewise failed to break up the aforesaid landing and disperse and expose the accumulations of debris, wood, bark, logs, chunks and other inflammable materials in said landing, although they could have done so during said period. During said period they did not use sufficient water to extinguish the fires burning as aforesaid, although sufficient water, equipment and manpower were available for that purpose. They likewise failed to maintain night patrols around said 1600-acre area, and especially near the westerly border thereof, although men and equipment for that purpose were available and there were ample roads for ingress and egress to and from the area.

XXVII.

District Ranger Floe, District Assistant Ranger Evans and other subordinates of Mr. Floe knew at all times between August 11 and September 20, 1951, that fires were smoldering within the 1600-acre area during that period. On about September 13, 1951, a northeasterly wind of not unusual velocity blew sparks out of smoldering debris in or near the landing described in paragraph XXI and jumped the

westerly fire trail around said area into the adjacent unburned combustible materials, and caused fires to flare up, which incident occurred and was observed while men were present, and as a consequence the fire so caused was extinguished. Frequently throughout the above-mentioned period smokes and flames would appear in various places in the 1600-acre area which were seen by District Ranger Floe or his various subordinates. During said period Mr. Floe, through personal observation, was aware of the fire burning in the landing.

XXVIII.

District Ranger Floe and his subordinates knew or should have known that winds in the Soleduck valley increased in intensity and force as the elevations increased. The elevations in the 1600-acre area range from approximately 1,000 to 2,500 feet above sea level. The immediately adjacent country ranges up to even higher elevations.

XXIX.

At no time during the month of September, 1951, prior to September 20 did District Ranger Floe or his subordinates maintain or cause to be maintained a night patrol crew or night watchman in or near the vicinity of the 1600-acre area, nor a night lookout at the established North Point Lookout Station on a nearby mountain, which commanded a view of said entire area. Under the conditions then prevailing in said area, as hereinabove described, a reasonably prudent man in the position of District

Ranger Floe or District Assistant Ranger Evans would have maintained night patrols and watchmen and night lookout.

XXX.

In the early morning of September 20, 1951, a northeasterly wind of not unusual force blew across the 1600-acre area and blew sparks and burning material from the debris, logs, bark, stumps, wood chunks and the landing above referred to or other burning materials in or near the westerly portion of the 1600-acre area, and carried the same into the timber, young growth, brush, slash and other inflammable material lying westerly and southerly from the 1600-acre area. Said sparks caused fire in the last-described materials and timber, and said fires spread rapidly to the west and south and to some extent to the east, burning timber, young growth, bridges, equipment, railroads, telephone lines and other property, including that hereinafter more specifically described, and causing the damage hereinafter described. Said fire and said damage were the direct and proximate result of the escape-ment of sparks and burning materials from the 1600-acre area. The fire so caused was not discovered until after it had been burning for some time and until it reached a stage where it was uncontrollable. The fire was discovered by someone other than District Ranger Floe or any of his subordinates.

XXXI.

For several days following the outbreak of the fire on September 20, 1951, the fire burned an area

extending approximately 20 miles in a northeast-southwest direction, and various distances up to 5 miles in a north-south direction, causing damage to plaintiff as hereinafter set forth.

XXXII.

The fire and all burning material within the 1600-acre area and especially in the westerly portion of said area and in the landing described in paragraph XXI above could have been completely extinguished between the dates of August 11 and September 19, 1951, and the fire which broke loose on September 20, 1951, could have been avoided, by the use and employment of more men, tools, equipment, water and supplies, and such men, tools, equipment, water and supplies were available and could have been so used and employed by District Ranger Floe and his subordinates.

XXXIII.

Had men, tools, equipment, water and supplies been maintained on hand during the night of September 19 and September 20, the sparks and burning materials which carried into the adjacent slash and timber could have been suppressed or any fires created by such sparks and burning materials could have been immediately suppressed. All necessary men, tools, equipment, water and supplies were available at that time and could have been so used and employed by District Ranger Floe and his subordinates.

XXXIV.

The use and employment of additional men, tools,

equipment, water and supplies in the manner described above would have been availed of by a reasonably prudent owner of lands and timber and by a reasonably prudent person having any duty or responsibility in the fighting and suppression of the fires above described, and such action would have been consistent with sound, careful and prudent practice. Failure to take such action under the conditions and circumstances above described was imprudent, careless, negligent and in disregard of responsibility for and the care and safety of property and in disregard of the responsibility and duty of a landowner.

XXXV.

Under the facts, circumstances and conditions described in this complaint, District Ranger Floe and his subordinates, including District Assistant Ranger Evans, were negligent in the following particulars:

(a) In permitting the existence of the fire hazard on defendant's lands as described in paragraph XI hereof and in failing and neglecting to abate the same;

(b) In permitting the operation of defective and deficient equipment of Port Angeles Western Railroad in the manner and on the lands described in paragraph XI, and in failing to require Port Angeles Western Railroad to follow up its trains with speeders or other equipment with men to watch for fires caused by trains, as stated in paragraph

XI, and in failing to abate said operations and practices;

(c) In failing to dispatch adequate and sufficient men, tools and equipment to extinguish the fires which broke out on August 6, 1951;

(d) In failing to patrol and extinguish all fires on August 6 and August 7, 1951, by not utilizing and employing sufficient manpower, tools, equipment, water and supplies;

(e) In failing to dispatch and put to work in fighting the fire large numbers of men and quantities of tools, equipment, water and supplies by daybreak or shortly thereafter on August 7, 1951;

(f) In failing to hunt for, discover and extinguish all fire and burning material in the 1600-acre area and every part thereof, including the landing described in paragraph XXI, on and between August 11 and September 19, 1951;

(g) In failing to observe, recognize and take appropriate action and precautions because of the fire hazard created by the weather and indicated by weather forecasts during all times on and between August 6, 1951, and September 20, 1951;

(h) In failing to use and employ adequate men, tools, equipment, water and supplies on and about the 1600-acre area, including the landing described in paragraph XXI, to completely extinguish all fires therein between August 11 and September 19, 1951, when they and each of them knew or should

have known of the hazardous fire conditions and the possibility of fire breaking out and causing extensive damage;

(i) In failing to maintain a patrol, watchman or crew on and about the 1600-acre area throughout the day and night between August 11 and September 20, 1951;

(j) In failing to maintain at all times throughout the day and night a lookout or lookouts to watch for the blowing of sparks and burning material and commencement of fires in and in the vicinity of the 1600-acre area;

(k) In failing to break up, disperse, expose and dispose of the landing referred to in paragraph XXI hereof, and to extinguish every vestige of fire in the materials in and about said landing;

(l) In reducing the size of the crews of men and the quantity of equipment and tools which had originally been employed on and about the 1600-acre area, and in reducing the size of said force to two men on September 19, 1951, in spite of the weather forecasts and humidity readings as alleged above;

(m) In failing to use and employ large crews and a great deal of equipment on and about the 1600-acre area on the one occasion when there was appreciable rainfall in said area between August 11 and September 20, 1951, at which time the use and employment of men and equipment would have been most effective;

(n) In failing to carry out and put into effect the Fire Suppression Plan referred to in paragraph XVIII hereof and to employ and use all men, tools and equipment available under said Plan and available otherwise, and to employ and use them promptly when the need therefor arose;

(o) In failing to use sufficient water to extinguish all fire, when sufficient water for said purpose was at all times available.

XXXVI.

Each and every one of the acts and omissions of defendant's employees, including District Ranger Floe and District Assistant Ranger Evans and their subordinates, and each of them, hereinabove described directly and proximately caused and contributed to the fire which broke out on September 20, and the damage caused by said fire and the damages and loss sustained and suffered by plaintiff as herein alleged.

XXXVII.

Mature timber killed, but not totally destroyed by fire can be salvaged if logged promptly. After being killed certain species deteriorate more rapidly than others, both through natural processes of decay and because of bugs and worms which attack them.

XXXVIII.

As a direct, natural and proximate result of the fire hereinabove described and of the negligent acts and omissions of the defendant and of District Ranger Floe and his subordinates, and each of them,

herein described and complained of, plaintiff sustained and suffered the following damage and loss:

(a) The young growing timber and seedlings owned by plaintiff on the lands described in Exhibit A were totally destroyed and said lands were otherwise damaged. The difference in values, immediately before and after the fire, of the lands described in Exhibit A, including the young timber thereon, is the sum of \$212,955.50, and plaintiff was thereby damaged in that amount.

(b) The mature merchantable timber owned by plaintiff on the lands described in Exhibit B was damaged or destroyed, and deterioration of damaged timber has continued since the fire. The loss in value of said timber as a direct and proximate result of said fire and said negligence is the sum of \$374,035.00, and plaintiff was thereby damaged in that amount.

(c) The lands owned by plaintiff described in Exhibit B were damaged. The difference in values, immediately before and after the fire, of the lands described in Exhibit B is the sum of \$8,360.00, and plaintiff was thereby damaged in that amount.

(d) Timber which plaintiff had the right and obligation to purchase, cut and pay for under the two Timber Sales Contracts described in paragraph IV hereof was damaged and deterioration thereof has continued since the fire. The loss in value of said timber as a direct and proximate result of said fire

and said negligence is the sum of \$189,444.40, and plaintiff was thereby damaged in that amount.

(e) Approximately 6.60 miles of railroad line and track owned by plaintiff was damaged and destroyed, causing damage to plaintiff in the amount of \$89,171.30.

(f) Approximately 3.66 miles of railroad line and track between said burned portion of plaintiff's railroad line and its junction with plaintiff's main line railroad near Sappho, Washington, was rendered useless and has had to be abandoned, to plaintiff's damage in the amount of \$48,782.29.

(g) Plaintiff's railroad bridge across the Soleduck River near plaintiff's Sappho camp was rendered useless and has had to be abandoned, to plaintiff's damage in the amount of \$13,649.66.

(h) Approximately 5.32 miles of telephone system owned by plaintiff was totally destroyed, to plaintiff's damage in the amount of \$3,407.00.

(i) Approximately 2.88 miles of telephone line owned by plaintiff between the burned portion thereof and plaintiff's camp at Sappho, Washington, was rendered useless and has had to be abandoned, to plaintiff's damage in the amount of \$1,889.00.

(j) Plaintiff helped fight said fire, which work was required by law and was necessary in order to do as much as possible to prevent the spread of the fire and to save other property from damage or destruction. In such fire fighting plaintiff incurred

expenses, both in labor and in use of equipment, for which it has not been paid or reimbursed, in the amount of \$16,184.29, and plaintiff was thereby damaged in that amount.

(k) In order to salvage such property as it could from the fire, determine the extent and nature of the loss and perform engineering and field work in connection therewith, plaintiff incurred expenses in the amount of \$11,073.08, for which it has not been reimbursed, and plaintiff was thereby damaged in that amount.

(l) In order to salvage timber killed by said fire, it was necessary for plaintiff to alter its logging program and to concentrate on the logging of fire-killed timber. This course resulted in plaintiff having to partially abandon or temporarily abandon other logging operations and logging camps and several logging roads for a period of approximately three years. The fair and reasonable value of said logging camps and logging roads and the deterioration or depreciation thereof as a direct and proximate result of said fire and negligence is the sum of \$53,488.00, and plaintiff has been damaged in that amount.

(m) Also as a result of alteration of its logging program described in item (l) above, plaintiff halted certain road construction, as a result of which roads were not built into certain areas where plaintiff had been falling timber and bucking the same into logs. The logs so produced have had to remain on the ground and have deteriorated and will con-

tinue to deteriorate and become a total loss before plaintiff, in its logging operations, can recover them. Said logs, having a volume of approximately 5,992,000 feet, board measure, had a fair value of \$107,856.00, and by reason of the loss thereof plaintiff has been damaged in that amount.

Wherefore, plaintiff prays for judgment against the defendant in the sum of \$1,130,295.52, for its costs and disbursements incurred herein, and for such other and further relief as to the court may seem just and proper.

HOLMAN, MICKLELWAIT,
MARION, BLACK & PERKINS,
/s/ LUCIEN F. MARION,
Attorneys for Plaintiff.

Copy Received 2/19/54.

F. N. CUSHMAN,
Assistant U. S. Attorney.

EXHIBIT A

Reproduction Lands Burned

Twp.	Range	Sec.	Sub-division	Acres
29N	11WWM	8	E $\frac{1}{2}$ (partial)	318
		9	W $\frac{1}{2}$ NE, E $\frac{1}{2}$ NW, S $\frac{1}{2}$ S $\frac{1}{2}$	320
		10	NESW, N $\frac{1}{2}$ SE, SESE	160
		16	NWNE, N $\frac{1}{2}$ NW, SWNW	160
		17	E $\frac{1}{2}$ NE, S $\frac{1}{2}$ SWNE, S $\frac{1}{2}$ S $\frac{1}{2}$ NW, S $\frac{1}{2}$	460
		18	S $\frac{1}{2}$ SENE, SE $\frac{1}{4}$	180
		19	S $\frac{1}{2}$ NE (partial)	78
		20	NE $\frac{1}{4}$, S $\frac{1}{2}$ NW	240
		21	NW $\frac{1}{4}$ (partial)	120
29N	12WWM	11	SESW, SWSE, W $\frac{1}{2}$ SESE (partial)	32
		13	S $\frac{1}{2}$ N $\frac{1}{2}$ SW, S $\frac{1}{2}$ SW, SWSE, S $\frac{1}{2}$ SESE	180
		14	NWNE, N $\frac{1}{2}$ NW, N $\frac{1}{2}$ SWNW, SE $\frac{1}{4}$ (partial)	276
		15	NE $\frac{1}{4}$, W $\frac{1}{2}$ less W $\frac{1}{2}$ NWNW, N $\frac{1}{2}$ NESE, W $\frac{1}{2}$ SE (partial)	375
		20	SE $\frac{1}{4}$ (partial)	132
		21	NE $\frac{1}{4}$, SW $\frac{1}{4}$, N $\frac{1}{2}$ SE, SWSE (partial)	429
		22	S $\frac{1}{2}$ NWNE, SWNE, S $\frac{1}{2}$ SENE, W $\frac{1}{2}$, SE $\frac{1}{4}$	560
		23	N $\frac{1}{2}$ NE, E $\frac{1}{2}$ SWNE, SENE, S $\frac{1}{2}$ N $\frac{1}{2}$ SW, S $\frac{1}{2}$ SW, SE $\frac{1}{4}$ (partial)	406
		24	N $\frac{1}{2}$, SW $\frac{1}{4}$, W $\frac{1}{2}$ SE (partial)	539
		25	NWNE	40
		26	NW $\frac{1}{4}$ (partial)	155
		27	NE $\frac{1}{4}$, N $\frac{1}{2}$ NW, SWNW, S $\frac{1}{2}$ (partial)	526
		28	All	640
		29	E $\frac{1}{2}$ (partial)	318
		31	NENE, S $\frac{1}{2}$ NE, SESW, SE $\frac{1}{4}$ (partial)	180
		32	NWNE, S $\frac{1}{2}$ NE, NWNW, S $\frac{1}{2}$ NW, SW $\frac{1}{4}$, S $\frac{1}{2}$ SE (partial)	359
		33	N $\frac{1}{2}$ NE, SWNE, NW $\frac{1}{4}$, NESW, S $\frac{1}{2}$ SW, SWSE (partial)	308
		34	NWNW, S $\frac{1}{2}$ SW (partial)	20
		35	SW $\frac{1}{4}$ (partial)	35
29N	13WWM	26	SWSE (partial)	5
		27	S $\frac{1}{2}$ SE (partial)	17
		33	NESE, S $\frac{1}{2}$ SE (partial)	39
		34	E $\frac{1}{2}$ NE, SENW, S $\frac{1}{2}$ (partial)	384
		35	NWNE, S $\frac{1}{2}$ NE, S $\frac{1}{2}$ NW, S $\frac{1}{2}$ (partial)	437

vs. United States of America

35

28N 13WWM	2	Lots 1, 4, NWSW, E $\frac{1}{2}$ SWSW (partial)	45
	3	Lots 1, 4, NW $\frac{1}{2}$ W $\frac{1}{2}$ SE (partial)	80
	4	Lots 4, 7, NESW (partial)	69
	8	S $\frac{1}{2}$ NE (partial)	45
	9	N $\frac{1}{2}$ SWNW, SWSWNW (partial)	18
	11	NWNE (partial)	8
	15	NENW (partial)	5

8,698

EXHIBIT B

Timbered Lands Burned

Twp.	Range	Sec.	Sub-division	Acres
29N	11WWM	19	S $\frac{1}{2}$ NE (partial)	2
		21	NENW, S $\frac{1}{2}$ NW (partial)	40
29N	12WWM	15	SWNE, NW $\frac{1}{4}$, N $\frac{1}{2}$ SW, SWSW (partial)	91
		20	N $\frac{1}{2}$ SE (partial)	28
		21	N $\frac{1}{2}$ NE, SWNE, N $\frac{1}{2}$ SW (partial)	11
		23	SE $\frac{1}{4}$ (partial)	14
		24	SENE (partial)	21
		26	NWNW (partial)	5
		27	NENE, N $\frac{1}{2}$ NW, SWNW, SESW, NESE, S $\frac{1}{2}$ SE (partial)	74
		29	NWNE (partial)	2
		31	NENE, SWNE, SESW, N $\frac{1}{2}$ SE, SESE (partial)	140
		32	NWNE, W $\frac{1}{2}$ NW, W $\frac{1}{2}$ SW, S $\frac{1}{2}$ SE (partial)	121
		33	NE $\frac{1}{4}$, SENW, NESW, SWSW, SE $\frac{1}{4}$ (partial)	292
		34	N $\frac{1}{2}$, SW $\frac{1}{4}$, N $\frac{1}{2}$ SE, SWSE (partial)	580
		35	SW $\frac{1}{4}$ (partial)	125
29N	13WWM	35	NWNE, S $\frac{1}{2}$ NE, S $\frac{1}{2}$ NW, SESE (partial)	78
28N	13WWM	2	Lots 1, 4, NWSW (partial)	48

1,672

[Endorsed]: Filed February 19, 1954.

In the District Court of the United States for the
Western District of Washington, Northern
Division

No. 3533

RAYONIER INCORPORATED, a Delaware Cor-
poration,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

TRANSCRIPT OF COURT'S
ORAL REMARKS

In the above-entitled and numbered cause, given
on the 18th day of January, 1954, by the Honorable
George H. Boldt, United States District Judge, at
Seattle, Washington.

Appearances:

LUCIEN F. MARION, ESQ.,

BURROUGHS B. ANDERSON, ESQ.,

Appeared on Behalf of the Plaintiff,
Rayonier Incorporated.

FRANCIS N. CUSHMAN, ESQ.,

Assistant United States Attorney,
Department of Agriculture.

ARNO REIFENBERG, ESQ.,

Assistant United States Attorney.

Appeared on behalf of the Defendant,
United States of America.

W. H. FERGUSON, ESQ.,

WILLIAM WESSELHOEFT, ESQ.,

Appeared on Behalf of Plaintiffs, Arthur
A. Arnhold, et al., in Cause Number 2956.

DONALD A. SCHMECHEL, ESQ.,

RICHARD E. CALLAHAN, ESQ.,

Appeared on behalf of Port Angeles
Western Railroad Company.

ALTHA P. CURRY,

Appeared on Behalf of Fibreboard
Products, Inc.

(Whereupon, arguments having been had by
counsel upon motion of Defendant to dismiss,
the following proceedings were had, to wit:)[3*]

The Court: This matter presents a question that
is certainly far free from doubt, at least in my
mind.

My general impressions at this time about it are
that in the absence of the Dalehite case I would
overrule the motion, but the opinion in the Dalehite
case gives me grave doubt as to whether or not this
claim is within the Federal Tort Liability Act.

Unfortunately, the language of the majority
opinion in the Dalehite case in so far as it bears on
our problem, is in itself not free from doubt. The

*Page numbering appearing at foot of page of original Reporter's
Transcript of Record.

difficulty I have is in determining whether or not Floe was acting as a public fireman. If in all of the matters referred to in the complaint he was acting as a public fireman, according to Dalehite there is no action because Justice Reed says in the majority opinion after referring to the Act and a quotation from the Feres case says:

“It——”

namely the Act,

“——did not change the normal rule that an alleged failure or carelessness of public firemen does not create private actionable rights.”

Query: Under the allegations of this pleading was Floe acting as a public fireman?

It is clear he was acting as a fireman because [4] everything that is alleged in the complaint is to the effect that he was directly engaged in the matter of fighting fire. So he must have been a fireman no matter how poor a fireman or inadequate a fireman or negligent a fireman, he was clearly a fireman.

Now, that leaves the only question; was he a public fireman under this language of the Dalehite case? And I do not intend to engage in a philosophical debate with the Supreme Court. It is my obligation under the oath that I have taken, to apply the law as laid down by the Supreme Court, even though I might have thought otherwise if it had been presented to me as a matter of first impression.

All right. Does that not narrow the question

down then to the question of whether or not Floe was a public, acting in a public capacity as a fireman?

You put the question that way and it sounds like a rhetorical question. He certainly wasn't acting on his, in his independent capacity. That is alleged with great particularity in the complaint that he was acting in a public capacity, that he was acting as a representative of the United States Forest Service.

He was a fireman and it is very clear that he was a public fireman, no matter how inadequate or negligent or careless in his job, and Justice Reed says in the majority opinion: [5]

"It——"

namely the Federal Tort Liability Act,

"——did not change the normal rule that an alleged failure or carelessness of public firemen does not create private actionable rights."

He goes on to say:

"There is no analogous liability; in fact, if anything is doctrinally sanctified in the law of torts it is the immunity of communities and other public bodies for injuries due to fighting fire."

Now, it is true in that paragraph he was talking about whether or not a cause of action, tort cause of action, of the character referred to existed prior to the adoption of the Act, but still the language that

is used is very, very unequivocal and very sweeping. The last sentence of that same paragraph he says:

“To impose liability for the alleged nonfeasance of the Coast Guard would be like holding the United States liable in tort for failure to impose a quarantine for, let us say, an outbreak of foot-and-mouth disease.”

Is it an unfair thing to say, to paraphrase that language [6] and say:

“To impose liability for the alleged nonfeasance of the Coast Guard would be like holding the United States liable in tort for failure of the Forest Service in fighting a forest fire”?

If you say the one thing, it seems to me you'd surely say the other.

Personally I would prefer to decide the issue after having heard all of the evidence when I might perhaps more adequately judge the nature, extent, character of the capacity of the Forest Service with respect of fighting fire, and yet it seems to me that it would expedite the disposition of this matter if all concerned, both Government and plaintiffs, plaintiff, have a ruling from higher authority than mine on this basic question which, if decided adversely to the plaintiff, disposes of the case. If not so decided, then there would be very extensive proceedings required in order to determine whether in fact Floe was negligent, and if so, whether his negligent acts caused the damage complained of and the nature and extent of the damage.

Gentlemen, I am of the opinion that I am obliged under the Dalehite case, particularly the portions of it that I have referred to and which, incidentally, I have [7] studied and restudied long before today, to sustain the motion to dismiss, basing it entirely on the Dalehite case.

That will be the order of the Court.

Mr. Marion: Your Honor, would it be an imposition to ask you, for the purpose of the record, to state your position on the duties of the Government as a landowner; on whose land the fire originated due to an accumulation of debris; whether or not using a fire department or any other means is controlling of that issue?

The Court: My general impression, if you want that; is that what you——

Mr. Marion: I think quite apart from the Dalehite case.

The Court: My general impression is that on that phase of the case I would not sustain this motion to dismiss, myself on that phase of the case. I—if the Government does not have immunity by virtue of its capacity as a public fireman, my opinion is there is a duty, there would be a duty to exercise reasonable care in confining, controlling and extinguishing fire and consequently I would be of the opinion that the action might be maintained, but for the public capacity of the Forest Service in the matter of fighting fire.

Does that give you what you have in mind, or——

Mr. Marion: May I confer with my [8] "betters," your Honor?

(Whereupon, Mr. Marion conferred with co-counsel.)

Mr. Marion (Continuing): As I understand your Honor, your Honor holds that in taking part in the forest fire fighting activities Mr. Ranger Floe and his subordinates were operating a public fire department or public firemen?

The Court: No, that isn't what I said. I said they were acting as public firemen.

Mr. Marion: And——

The Court: I don't know whether they had a whole department or a regiment or a squad or single individuals, but I think under the language in the Dalehite case if a Government employee is acting in the capacity of a public fireman, whether he be as an individual or whether he be as a troop or a squad or a regiment or what, under that decision there is no liability under the Act.

Mr. Marion: And that applies even though the fire originated on lands owned by the Government for pecuniary gain and profit and due to a condition, an accumulation of inflammable material which, under the statutes of the State, are a nuisance?

The Court: You are going beyond what I think, what I understood your question to call for.

Mr. Marion: I am trying, your Honor, to narrow [9] this down so that we may know precisely the question to be decided.

The complaint alleges, of course, a condition which is a nuisance under the laws of the State of Wash-

ington in that there were accumulations of debris and so forth. This condition existed on the lands owned by and subject to control of the Government. Now your Honor's ruling is that because the Forest Service employees were what you termed "public firemen"—

The Court: What Justice Reed termed as "public firemen."

Mr. Marion: —these other factors are superseded by and do not influence your decision.

The Court: That is right. If I have been—I have been seriously thinking during the last hour or two of the advisability of taking the matter under advisement and writing a written opinion—a temptation which has occurred to me before and up to now I have successfully resisted. I was getting very close to yielding to that temptation on this occasion, but finally concluded that I believe that it is to the best interests of all concerned that we speed on with the disposition of it, and my—I can only give you my honest, best judgment about it as I see it, and that is what it is, and I think that if you have a mind to do so, you can review that order very cheaply, inexpensively, and I [10] hope expeditiously, and if I am wrong, be back in a reasonably short time for a trial of the case on its merits.

Mr. Marion: I have in mind, your Honor, the possibility of filing an amended complaint to add a few more facts. That is something I will have to—

The Court: I won't enter an order until both sides have had a full opportunity to digest—if they

find my comments digestible—what I have said, not only with respect to the ruling just made, but earlier in the day, so that the Government may cogitate that phase of it as well as yourself, and then we will see what comes of that thought on your part.

If you decide that you want to apply for leave to file an amended complaint, I see no reason why that permission can't be granted you now to avoid the argument of the matter, if you desire to do it. Do you have any objection to granting such leave? (Addressing Mr. Cushman.)

Mr. Cushman: No, your Honor, I don't believe so.

Mr. Marion: I might say that in view of the clear manner in which your Honor has expressed himself, I doubt that an amended complaint would change your Honor's mind or change the question to be presented.

The Court: I doubt it myself, Mr. Marion. The concern I have about this part of it is that I would like, if the case is going to be reviewed, that it be reviewed in [11] a manner which will be helpful when you get a ruling. Do you understand what I mean?

Mr. Marion: Yes, I do.

The Court: In other words, if my decision would be reversed, I hope it would be reversed on something that would be basic so we will have something that would be helpful.

On the other hand, if it is sustained, that is the end of the case there. That is why I think if you

want to amend in some particular after thinking about it further, you think that you should amend, why do so and we will rehear the matter if necessary. Likewise, if there is any—if the Government feels that the record should be amplified in some manner, it will have leave to take whatever action it thinks advisable. Is that clear now?

Mr. Reifenberg: Yes.

The Court: Very well.

(Whereupon, further discussion was had, other matters were considered, and Court was adjourned at four-fifteen o'clock p.m.)

Certificate

I, Adele U. Douds, official reporter for the within-entitled court, hereby certify that the foregoing is a full and complete transcript of matters therein set forth.

/s/ ADELE U. DOUDS.

(At a later date this sheet was substituted for pp 12 thru 15 originally filed, per counsel's request.)

[Endorsed]: Filed January 20, 1954. [12]

In the District Court of the United States for the
Western District of Washington, Southern
Division

No. 3533

RAYONIER INCORPORATED, a Delaware Cor-
poration,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

No. 2956

ARTHUR A. ARNHOLD, et al.,

Plaintiffs,

vs.

UNITED STATES OF AMERICA and PORT
ANGELES & WESTERN RAILWAY COM-
PANY, INC., a Delaware Corporation,

Defendants,

FIBREBOARD PRODUCTS, INC., a Delaware
Corporation, and A. R. TRUAX, Trustee in
Reorganization,

Additional Defendants.

TRANSCRIPT OF PROCEEDINGS

27th Day of February, 1954

Before: Honorable George H. Boldt,
United States District Judge.

Appearances:

LUCIEN F. MARION, ESQ.,
BURROUGHS B. ANDERSON, ESQ.,

Appeared on Behalf of the Plaintiff,
Rayonier Incorporated.

FRANCIS N. CUSHMAN, ESQ.,
Assistant United States Attorney.

ARNO REIFENBERG, ESQ.,
Assistant United States Attorney.

GUY A. B. DOVELL, ESQ.,
Assistant United States Attorney.
Appeared on Behalf of Defendant,
United States of America.

W. H. FERGUSON, ESQ.,
WILLIAM WESSELHOEFT, ESQ.,
Appeared on Behalf of Plaintiffs,
Arthur A. Arnhold, et al.

DONALD A. SCHMECHEL, ESQ.,
Appeared on Behalf of Defendant Port
Angeles Western Railroad Company.

ALTHA P. CURRY,
Appeared on Behalf of Defendant
Fibreboard Products, Inc.

(Whereupon, the following proceedings were
had, to wit:) [3*]

*Page numbering appearing at foot of page of original Reporter's
Transcript of Record.

PROCEEDINGS

The Court: We will proceed to consider the motions in Arnhold and Rayonier vs. United States.

Mr. Cushman: Your Honor, I wish permission to continue orally the motion in the Rayonier case against the amended complaint and an amended complaint has also been filed in the Arnhold case in the last day or two and I didn't have time to get out a new motion for judgment on the pleadings against that complaint and—— [4]

* * *

The Court: I see. Very well, are you ready then to proceed? Do you want to proceed Mr. Marion?

Mr. Marion: Yes, your Honor. I wonder if I might, for the purposes of the record, ask Mr. Cushman to state his motion orally, reading from his prior motion but substituting the word "amended complaint" instead——

The Court: I think that would be a good thing to do. Do that Mr. Cushman. Then we will have——

Mr. Marion: There were two grounds, that is why I wanted to have it clear.

Mr. Cushman: (Reading.)

"The Defendant herein moves the Court as follows:

"1. To dismiss the action because the plaintiff fails to state a claim against the defendant."

The Court: You wanted to read "amended complaint." [6]

Mr. Cushman: I beg pardon. (Reading.)

"The Defendant herein moves the Court as follows:

"1. To dismiss the action because the amended complaint fails to state a claim against the defendant upon which relief can be granted.

"2. To dismiss the action on the ground that the Court lacks jurisdiction over the subject matter in the action."

The Court: Very well. That motion will be allowed and will be——

Mr. Marion: That is in the Rayonier case.

May it please the Court, I will not repeat my prior arguments unless to the extent that your Honor requests further discussion of them. I will be brief.

I want simply to point out the changes which have been made in our complaint. The purpose of our amendments is not to change the fact, but simply to set forth the additional facts and to put the picture in proper perspective. I believe that Mr. Anderson of our office prepared and filed, and I think it has been submitted to you, a memorandum of the changes which have been made.

The Court: Yes, we made an analysis of the amended complaint and the copy that you supplied us and have marked [7] thereon the changes from the original and have studied and examined it so that I think in general terms I have in mind what you did by the amendments.

Mr. Marion: Well then, very briefly it is simply that,——

The Court: Yes?

Mr. Marion: —to point out that the Federal Government here is a timberowner just as all other timber-owners are there and the men whom they employ. The district ranger and his subordinates are caretakers and custodians of the land; they have numerous duties, one of which is the same duty which any private timberowner would have. It is to watch out for fires and if fire occurs, to get on the job and do something about it. That the Forest Service does not have a fire department as such any more than any other timberowner has a fire department; that the timber industries being the main source of supply of wood in the Olympic Peninsula, everyone is interested in supressing fire, is willing to respond to the call of his neighbor and to lend himself and his equipment to fight the common enemy.

The Forest Service is no different from any other timberowner in that respect. The fire suppression plan which the Forest Service had was the same sort of a plan that other timberowners had. They have only a few men themselves but they know where to go to call on their neighbors, people [8] in private employ, equipment privately owned, and say, "Our common enemy is at work, come and respond," the Forest Service still in this case assuming exclusive supervision and control of the direction of the fire fighting activities.

The other major respect is in enlarging upon the delinquency of the Forest Service and its employees in tolerating fire hazards both as to hazardous con-

ditions and hazardous practices upon their lands by the Port Angeles Western Railway, and additional allegations of negligence in their failure to take or cause to be taken steps to abate those hazardous conditions and practices.

These points are designed to clear the record that this is not a fire department, that the Government is a landowner, landowner and timber-owner and operates for pecuniary gain and profit, that they have the same duties, obligations that any other landowner does, are responsible for conditions on their lands and lands over which they have control including the railroad right-of-way, and that under the laws of the State of Washington, they should respond just as a private individual would respond in the same circumstances.

Now, unless your Honor desires further argument, I don't propose to take any more of your time. I think that may—whether it may alter your Honor's thinking because of the change of emphasis in our original complaint—we did [9] not make clear the fact that fire fighting was only one of many duties of the district ranger—whether that would alter your Honor's thinking under the circumstances, I don't know, but that in essence is the nature and reason for the changes which we have made.

The Court: I would not want you to think or anyone else that I have not given the matter very full and serious and earnest thought. I have. But the fact of the matter is, I do not think that any extended argument would change our view and—

Mr. Marion: If I may interrupt, your Honor?

The Court: Yes?

Mr. Marion: May I suggest this, before your Honor makes a formal ruling in our case. Mr. Ferguson, representing the plaintiffs in the related case, the Arnhold case, would like to be heard at some length, and since the issues are fundamentally the same, perhaps he can add further light to your Honor's thinking on it.

The Court: Very well. I will summarize the matter at the moment then by saying that as I understand the new allegations of your amended complaint in the Rayonier case, they in no manner withdraw from the allegations that on the previous hearing I considered constituted Floe and his people public firemen.

The other allegations, new allegations, simply [10] enlarge and state in more detail the allegations you rely on for constituting the Government ownership a private or nongovernmental ownership, if I may put it that way, stating the Government as being in a proprietary capacity with respect to the ownership of these lands.

In general I think that is correct, is it not?

Mr. Marion: That is correct in general, your Honor.

The Court: So the question for me then in your case is, would the enlarged allegations concerning proprietary capacity change my view of the controlling effect of the Dalehite case with respect to public firemen, or to, to put the same question another way, would the fact that a public fireman

was putting out fire on proprietary lands of the Government rather than on non-proprietary lands of the Government, change the result? At least that is the way I view it. I won't rule on it now. That is the way—that is the way I see the amended complaint as contrasted to the situation that was presented with the first complaint.

Mr. Marion: And also, to be a little clearer as to your Honor's thinking, your Honor is cognizant of the facts as enlarged here, that the district ranger and his subordinates were not maintained there for the purpose of fighting fires. That is one of many duties.

The Court: I have that. [11]

Mr. Marion: Not their primary duty.

The Court: I have that in mind.

Mr. Marion: I have nothing further then.

The Court: Very well, I will be glad to hear from Mr. Ferguson then.

(Whereupon, oral argument by Mr. Ferguson was had.)

The Court: Incidentally, I have just glanced through this file and I don't think that the Government ever filed a motion to dismiss in the Arnhold case. I don't believe there has ever been one filed there. Now, is it stipulated that you are now moving in the Arnhold case 2956?

Mr. Cushman: There seems to be some confusion. Mr. Reifenberg says I did file a motion for judgment on the pleadings.

The Court: Regardless of what my understand-

ing is, to clarify the situation now, whether or no the motion is in the file—I may have missed it, it is a very deep file with all these amended pleadings and I could have missed it, but whether or no it is there, do I understand that the Government——

Mr. Cushman: Yes.

The Court: ——in Cause No. 2956 moves for summary judgment of dismissal on the pleadings as to the Government [12] in those cases, is that right?

Mr. Cushman: Yes, your Honor.

The Court: In that case——

Mr. Cushman: The motion is filed and I believe it is probably in the Clerk's Office in Seattle.

The Court: It may well be, but regardless of that, is that your position now?

Mr. Cushman: Well, my position was for a motion for judgment on the pleadings and I believe that should be treated as a motion for summary judgment.

The Court: That is right, and so whether or no it is or is not in the file, that is what you now move and in the same terms that you stated when you made your motion in the Rayonier case, is that right?

Mr. Cushman: Yes, your Honor.

The Court: Now, if there is not any motion on file, is there any objection to my treating the matter as being presented on such a motion now at this time?

Mr. Ferguson: I am not making any technical objection.

The Court: I understood you were not, but just to clarify the record. I glanced through here and couldn't seem to find one. Mr. Foss looked and he couldn't find it, but it may well be there somewhere.

I understand that you had reference here to [13] this case in the Eighth Circuit, National Manufacturing Company and others, apparently a very recent decision of the Eighth Circuit, February 8th.

Mr. Ferguson: You mean the Missouri River Flood case?

The Court: The Flood case.

Mr. Ferguson: Yes, I'd like to take a minute on that if you'd like.

The Court: Well, I am not going to predicate my ruling on that case excepting only just in passing to say, and you may comment on this, that it seems to me that the philosophy in back of this decision supports the Government's contention in the present case.

Mr. Ferguson: May I answer that?

The Court: Yes.

(Whereupon, further oral argument by Mr. Ferguson was had.)

The Court: This is the second very able and thoughtful argument that has been presented to me to sustain the right of action contended for by the plaintiffs in these two cases. I have been very impressed by the argument and I will merely say of the argument this morning, that the doubt that I expressed at the commencement of my remarks on

January 17th may be somewhat deepened, but not to the point where I feel it requires a change in the ruling. [14]

Extended comment, I think, is not necessary, but perhaps just a word or two to indicate my thought. I am well aware of the important factual differences between the Dalehite case and the present case and between the Eighth Circuit National Manufacturing Company case and in fact all of the other cases that have been cited with the instant case. Nothing has been cited that is closely similar to our situation here in my opinion on the facts. And I will readily agree with Mr. Ferguson and repeat here what I said before, namely, that unfortunately the language of the majority opinion in the Dalehite case in so far as it bears on our problem is in itself not free from doubt, to put it at a minimum. Nevertheless, after giving this matter a very great deal of thought, I am satisfied that the basic philosophy supporting the majority decision in the Dalehite case, and a little more fully expressed in the Eighth Circuit case, requires, if followed, a granting of the motions to dismiss in the present case.

I should say that of course I did not undertake on January 17th at the conclusion of the previous argument to state all of the considerations that I had in mind, and I recognized then and I recognize now that the particular thing that I commented on at that time might have seemed to be a rather shallow analysis of the Dalehite opinion as it related to our present case. I am not going to attempt to elaborate [15] further on it now because in the last

analysis I am satisfied the decision will not be predicated on what I think or say about it if the case is reviewed. I merely meant in all fairness to indicate that I had that thought in mind.

I will say just one further thing. In view of the vastness of the public domain and the tremendous properties owned by the Federal Government, state governments as well, I feel that whether logical or not, there is a distinction, or it will be held that there is a distinction which is perhaps more literally correct statement of it, between the situation of real property owned by the Government and real property owned by an individual.

If we take the literal language of the Federal Tort Claims Act, it is very hard to justify on any logical basis that there is any distinction. I grant you that, but I am satisfied that public consideration, the serious implications that would flow from a failure to make such a distinction will dictate that such a distinction be drawn. If so, of course there, as far as I know, never has been any right of action against the state authorized by Washington law or any other state law as far as I know for negligence in the keeping of publicly-owned land, and I have an idea that that is the analogy that will be laid as a test for this situation rather than the strict analogy of a purely private individual owning forest lands in the State of [16] Washington.

But whether or no that ultimately be the case, in my own mind I feel obliged to grant the motions on the strength of the philosophy of the Dalehite

decision, and that is what the ruling of the Court will be.

Mr. Marion: Your Honor, I would like to ask Mr. Cushman's agreement—I mentioned this to him before—to put in the record those two aerial photographs which I had on the easel at our previous hearing, my point being that in reviewing this I thought the Court of Appeals would be aided by having that visual reproduction.

The Court: I am sure they would, and is there any objection to that?

Mr. Cushman: Your Honor, I don't believe we have any objection. That will help them on a factual basis.

The Court: I'd be prepared to overrule your objection if you had one because I think it is a proper thing to do and you may do it in such manner as you think best by designating them as Exhibits A and B to be attached to the complaint if you want, or in any other suitable manner that you—

Mr. Marion: I would like since there are already exhibits attached to the complaint—I think there are A and B already. I suggest they be given C and D if I may.

Now I'd like to offer for the record for the [17] purpose of visual aid and understanding to the Court, as Plaintiffs' Exhibit C, an aerial photograph bearing the legend "Rayonier, Inc., Mosaic of Calawah Fire Damage, scale one inch to twelve thousand feet"; date is 1951, the photograph being prepared by Carl M. Berry of Seattle.

By way of explanation of this exhibit, the parties

preparing this mosaic have outlined in red the close proximate boundaries of the fire occurring on and after September 20, 1951. That red line does not include the boundary of the sixteen hundred acre area which burned prior to that date.

May I call your attention, Clerk, this is Cause 3533.

I also offer in the same manner Plaintiff's Exhibit D which is an aerial photograph of the place of the origin of the fire on August 6, 1951, and the greater portion including all of the westerly portion of the sixteen hundred acre area which is referred to in the complaint, this aerial photograph bearing the date October 7, 1951, and being a scale of one inch to four hundred feet.

The Court: The same will apply to that exhibit.

Mr. Cushman: Your Honor, I wish to move to enter the cooperative agreement between the Forest Service—

The Court: You wish to what?

Mr. Cushman: I wish to have attached, if the Court will permit it, Exhibit, I mean the agreement between the [18] State of Washington and the Forest Service, cooperative agreement as referred to in both complaints, and I believe by stipulation that all parties are agreed.

The Court: Very well. Why don't you, to avoid complications, why don't you attach it as another exhibit in the same category as we have done here?

Mr. Marion: That is perfectly all right.

The Court: If you don't object to that. Now if you prefer it some other way, I am not trying to

impose my ideas on you. I am trying to get at it in the manner least cumbersome for the record.

Very well, let this item now be marked accordingly, whatever the next letter would be, Mrs. Freeny.

The Clerk: Yes, your Honor.

The Court: And treat it exactly as you do the photographs that Mr. Marion left with you. Do you follow me?

Are you going to attach something more?

Mr. Cushman: I wish to offer this and I believe there will be objection to it. Other parties have copies, your Honor. No, I will take that back. I wish to offer this only in the Rayonier case. It is offered for the purpose——

The Court: Have it tagged or something, Mr. Cushman, so we know what we are talking about.

The Clerk: This is 3533 and a defendant's exhibit? [19]

Mr. Cushman: Yes, Defendant's Exhibit 1.

The Clerk: I shall mark it as 1. Defendant's Exhibit 1 in Cause 3533 has been marked for identification.

The Court: Now, what is your——

Mr. Cushman: Your Honor, that exhibit is an affidavit made by Mr. Evans of the Forest Service showing in his opinion that the fire started on the railroad right-of-way. I offer this in support of one of the major arguments in my brief that there is no duty on the Forest Service because the fire originated on property in another party's control. Now,

Mr. Marion will have something to say on this affidavit.

The Court: Yes?

Mr. Marion: The plaintiff objects to the admission of this, your Honor, as being in effect contravention of the allegations in the complaint, not by way of enlargement of the facts, but in a challenge to the sufficiency of the complaint. I believe all of the facts properly plead in the complaint must be accepted as true.

This affidavit of Mr. Evans which counsel has offered states that Mr. Evans arrived at the point of the first fire on August 6th, the fire which ultimately spread and went into the sixteen-hundred-acre area. He arrived there about two-thirty p.m.

Mr. Cushman: If I can shorten this, your [20] Honor—do you controvert the facts stated in that affidavit?

Mr. Marion: No, I do not. All this does, it tells that Mr. Evans arrived two hours after the fire started, that he says the fire at that time lay in a certain direction and that two hours after the fire the wind was blowing from a certain direction. Therefore it is his opinion that the fire originated on the railroad right-of-way and close to the tracks.

The reason Mr. Cushman offers this, I believe, is that our complaint says the fire started on or in the vicinity of the right-of-way and the point is that the whole of the land is owned and under the control of the defendant. Mr. Cushman makes a point of distinction between the right-of-way of the railroad and other land owned by the defendant

outside of the right-of-way, and this affidavit contains merely Mr. Evans' opinion that the fire did start on the right-of-way. To that extent it is offered for the purpose of taking issue with the statements set forth in the complaint that it was on, in or near the vicinity of the right-of-way.

The Court: If it had been presented at the prior, prior to the argument of the motion, I would not, of course, give it any consideration if it bore on a controverted issue of fact. As I conceive the function of the Court on a motion to dismiss, is not to determine controverted issues of fact but to act, to rule only on the facts that are [21] indisputably shown by the record. It would seem to me then that in so far as this affidavit controverts the second portion of your allegation, namely, the portion about being in the vicinity, that it does state a—it does involve a matter of controverted fact. I think I should allow the affidavit to be filed, but I will reject it as being made a part of the record that I am considering. You will have it in the file and can take, review any—if my action is incorrect there will be available to you means of reviewing it.

Mr. Cushman: Your Honor, I primarily offered it because the Arnhold case has admitted facts and if possible we could establish the same facts in both.

Mr. Schmechel: I take it it is being offered simply in the Rayonier suit?

Mr. Cushman: Yes. Your Honor, the agreement between the State of Washington and the Forest Service has been offered for use, for consideration in both cases.

The Court: Yes, so I understood. There was no objection, was there?

Mr. Cushman: No, no objection.

The Court: Are you satisfied the record is clear on what has been done now?

Now next when will you be able to present your, the order? [22]

Mr. Marion: If we might have a few moments to review each others'—

The Court: Yes. While you are reviewing, may I ask one other thing, you might want to talk about that as well. In a case of this magnitude and importance, not only to the litigants, but generally to law, I would have much preferred taking the case under advisement and taking time to write and polish up an opinion, which perhaps is what I should have done anyway, but in order to expedite this disposition of the case, I ruled on January 17th orally and here again I have done likewise. Yet it seems to me desirable, that for whatever it is worth, my views ought to be made a part of any record that may be taken on appeal. I presume you have in mind doing that?

Mr. Marion: Yes.

(Whereupon, counsel conferred.) [23]

* * *

Mr. Marion: One other matter. In the [24] Rayonier case—I think it would also be true in the Arnhold case—the defendant's motion to dismiss was based on two grounds: one, no claim was stated, the other, the Court lacks jurisdiction. Do I as-

sume that your Honor denies the motion on the ground that the Court lacks jurisdiction?

The Court: That is right.

Mr. Marion: That is the basis on which we have prepared this order.

* * *

(Whereupon, discussion was had concerning the entering of the order.)

Mr. Marion: For the purpose of the record, I also wish to state that Rayonier Inc. does not wish to amend further and will stand on its amended complaint.

The Court: Very well. The order appears to me to [25] be in proper form. Do you have any objection to the form of the order now, Mr. Cushman?

Mr. Cushman: Well, your Honor, I don't believe that the first ground is well taken. I believe the Court should deny this motion because the Court lacks jurisdiction since the matter does not come within the Tort Claims Act, and that is it.

The Court: The point hasn't been presented to me at all in the argument.

Mr. Cushman: Pardon?

The Court: I didn't understand that the point had been presented to me in the argument at all. Perhaps inferentially it was, but I didn't so understand it.

Mr. Cushman: Perhaps I am confused, your Honor.

The Court: Maybe it is another way of saying the same thing.

Mr. Cushman: Our original motion had two grounds.

The Court: Oh, yes, of course, but I understood that the ground—that you were receding from the first ground but that the ground that was being urged was the old traditional “not sufficient facts to constitute a ground for relief.”

Mr. Marion: Your Honor, if you have no jurisdiction I don't believe your Honor could rule on the other ground.

The Court: I wouldn't think so too. That is [26] my impression. I think the order is in proper form. I am going to enter the order as now presented. It is signed, the Clerk is directed to enter it.

(Whereupon, discussion was had concerning entering of the order in the Arnhold case.)

The Court: We will draft an order in that—according to your stipulation just stated on Monday, and I will sign it and enter it without any further proceedings. Is that agreeable to both of you?

Mr. Cushman: Yes, your Honor.

Mr. Ferguson: Yes.

The Court: Very well. Is there anything further to be done then today?

Mr. Marion: Thank you very much for your very courteous—

The Court: We will now adjourn.

(Whereupon, Court was adjourned at twelve-five o'clock p.m.) [27]

Certificate

I, Adele U. Douds, official reporter for the within-entitled court, hereby certify that the foregoing is a full and complete transcript of matters therein set forth.

/s/ ADELE U. DOUDS.

[Endorsed]: Filed March 24, 1954.

[Title of District Court and Cause.]

ORDER GRANTING MOTION TO DISMISS

Plaintiff having duly and properly filed in the above-entitled cause its Amended Complaint, and defendant having duly filed its Motion to Dismiss directed against said Amended Complaint, said motion came regularly on for hearing this day before the Honorable George H. Boldt, judge of the above-entitled court. Defendant appeared by Assistant United States Attorney F. N. Cushman, and by Assistant United States Attorney, Department of Agriculture, Arno Reifenberg; the plaintiff appeared by its attorneys, Lucien F. Marion and Burroughs B. Anderson. The Court having heard arguments of counsel and being advised in the premises,

It Is Ordered as follows:

1. Defendant's Motion to Dismiss the action on the ground that the Court lacks jurisdiction over the subject matter of the action is denied.
2. Defendant's Motion to Dismiss the action because the Amended Complaint fails to state a claim

against the defendant upon which relief can be granted, is hereby granted and, plaintiff having elected to stand on said Amended Complaint, said Amended Complaint is hereby dismissed with prejudice.

Done in Open Court this 27th day of February, 1954.

/s/ GEO. H. BOLDT,
Judge.

Presented by:

/s/ LUCIEN F. MARION,
Of Attorneys for Plaintiff.

[Endorsed]: Filed February 27, 1954.

Entered March 1, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is given hereby that Rayonier Incorporated, the plaintiff named above, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Order Granting Motion to Dismiss entered in this action on February 27, 1954.

Dated this 24th day of March, 1954.

HOLMAN, MICKELWAIT, MARION, BLACK &
PERKINS,

/s/ LUCIEN F. MARION,
/s/ BURROUGHS B. ANDERSON,
Attorneys for Appellant,
Rayonier Incorporated.

[Endorsed]: Filed March 24, 1954.

[Title of District Court and Cause.]

**ORDER DIRECTING CLERK TO TRANSMIT
ORIGINAL EXHIBITS TO COURT OF
APPEALS**

Upon motion of Rayonier Incorporated for an order directing the Clerk of this Court to transmit to the United States Court of Appeals for the 9th Circuit certain original exhibits in this cause; and it appearing to the Court that the United States of America has no objection thereto; now, therefore,

It Is Hereby Ordered that the Clerk of this Court shall transmit to the United States Court of Appeals for the 9th Circuit the following original exhibits in this cause; to wit:

1. Plaintiff's Exhibits "C" and "D"; and
2. Defendant's Exhibit No. 2;

at the same time the said Clerk transmits to the said Court of Appeals the record on appeal in this cause.

Done in open court this 8th day of April, 1954.

/s/ GEO. H. BOLDT,
Judge.

Presented by:

HOLMAN, MICKELWAIT, MARION, BLACK &
PERKINS,

/s/ LUCIEN F. MARION,

/s/ BURROUGHS B. ANDERSON.

Approved for entry by the Court:

CHARLES P. MORIARTY,
United States Attorney;

By /s/ **F. N. CUSHMAN,**
Assistant United States
Attorney.

[Endorsed]: Filed April 8, 1954.

[Title of District Court and Cause.]

**CERTIFICATE OF CLERK U. S. DISTRICT
COURT TO RECORD ON APPEAL**

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 11 as amended of the United States Court of Appeals for the Ninth Circuit, and Rule 75(o) of the Federal Rules of Civil Procedure, I am transmitting herewith all of the original documents and papers in the file dealing with the above cause as the record on appeal herein from the Order Granting Motion to Dismiss filed February 27, 1954, to the United States Court of Appeals for the Ninth Circuit, at San Francisco, California, said papers being identified as follows:

1. Complaint, filed July 24, 1953.

2. Marshal's Return on Summons, filed July 28, 1953.
3. Appearance of defendant, filed Sept. 18, 1953.
4. Motion to Dismiss, filed Oct. 13, 1953.
5. Copy of Motion to Consolidate with Cause No. 2956 for Trial, filed Dec. 17, 1953.
6. Copy of Plaintiff's Brief on Motion, filed Dec. 17, 1953.
7. Notice of Motion to Consolidate, filed Dec. 17, 1953.
8. Brief of Deft. in Support of Motion to Dismiss, filed Jan. 8, 1954.
9. Notice of Hearing Motion to Dismiss, filed Jan. 12, 1954.
10. Reply to Ptff's Answering Brief, filed Jan. 15, 1954.
11. Court Reporter's Transcript of Court's Oral Remarks on Jan. 18, 1954, filed Jan. 20, 1954.
12. Amended Complaint, filed Feb. 19, 1954.
- ~~13. Affidavit in Support of Motion to Dismiss, filed Feb. 27, 1954. (Marked as Deft. Ex. 1. Denied—not sent up. Excluded by order.)~~
14. Order Granting Motion to Dismiss, filed Feb. 27, 1954.
15. Court Reporter's Transcript of Proceedings, filed March 24, 1954, covering date of Feb. 27, 1954.
16. Notice of Appeal, filed March 24, 1954.
17. Bond for Costs on Appeal, filed March 24, 1954.
18. Motion to transmit original exhibits, filed April 8, 1954.
19. Order to Transmit Original Exhibits: Ptff's

C and D, and Defendant's No. 2, filed April 8, 1954.

Plaintiff's Exhibits "C" and "D," and Defendant's Exhibit No. 2.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office by or on behalf of the appellant for preparation of the record on appeal in this cause, to wit: Filing fee, Notice of Appeal, \$5.00, and that said amount has been paid to me by counsel for appellant.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle this 21st day of April, 1954.

[Seal]

MILLARD P. THOMAS,
Clerk;

By /s/ TRUMAN EGGER,
Chief Deputy.

[Endorsed]: No. 14329. United States Court of Appeals for the Ninth Circuit. Rayonier Incorporated, a Corporation, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed April 23, 1954.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14329

RAYONIER INCORPORATED, a Delaware
Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS ON WHICH
APPELLANT INTENDS TO RELY

The points upon which appellant intends to rely
on this appeal are as follows:

1. The amended complaint states a claim against
the United States upon which relief can be granted
under the Federal Tort Claims Act.

2. The Federal Tort Claims Act states that the
United States shall be liable in tort “* * * in the
same manner and to the same extent as a private
individual under like circumstances * * *” (28
U. S. C. Sec. 2674) and “* * * under circumstances
where the United States, if a private person, would
be liable to the claimant in accordance with the law
of the place where the act or omission occurred.”
(28 U. S. C. Sec. 1346). A private individual stand-
ing in the place of the United States under the
circumstances alleged in the amended complaint
would be liable to appellant under Washington law.

3. The claim stated in the amended complaint
does not fall within any of the exceptions to liability
specified in 28 U. S. C. Sec. 2680.

4. The Federal Tort Claims Act waives all sovereign immunity from liability for tort except in the specific situations enumerated in 28 U. S. C. Sec. 2680. Immunity based on performance of a governmental function, as distinguished from a proprietary function, is not recognized or permitted under the Act except in those limited instances and functions specifically described in Section 2680.

5. Even if immunity from liability exists for torts committed in performance of a governmental function, that is immaterial in this case because the acts and omissions complained of were pursuant to a proprietary function on lands owned and operated by the United States for pecuniary gain and profit.

6. Appellee owed a duty to appellant, which it failed to meet, under common law, under the statutes of the State of Washington, and under contract between appellee and the State of Washington.

a. Under common law, if defendant's conduct threatens harm to plaintiff which a reasonable man could foresee, the defendant owes plaintiff a duty. This duty existed in appellee both as a landowner and as a volunteer. This principle applies with even greater force where the acting party (as in the case at bar) has superior knowledge of the possible harm.

b. Appellee, as an owner and operator of lands and timber, had duties under Remington's Revised Statutes, Secs. 2523, 5806, 5807 and 5818.

c. Appellee had a duty under its contract with

the State of Washington (Defendant's Exhibit No. 1) to fight and suppress the fire. It is immaterial whether appellant could sue under the contract. Appellee's duty extends to appellant.

7. *Dalehite vs. U. S.*, 346 U. S. 15, 97 L. Ed. 1427, relied upon by the District Judge, is not applicable to nor controlling of the case at bar.

8. Appellee's employees were not "public firemen" nor did they constitute a "fire department." Even if they were, that is immaterial under the circumstances and because of appellee's duties and obligations as a land and timber owner and because of the nuisance existing on appellee's lands.

9. "The vastness of the public domain and the tremendous properties owned by the Federal Government" does not justify a distinction "between the situation of real property owned by the Government and real property owned by an individual" as indicated by the District Judge.

10. The District Court erred in granting the motion to Dismiss the amended complaint on the ground that it failed to state a claim against appellee upon which relief can be granted.

HOLMAN, MICKELWAIT, MARION, BLACK & PERKINS,

/s/ LUCIEN F. MARION,

/s/ BURROUGHS B. ANDERSON,

Attorneys for Appellant.

Service of copy acknowledged.

[Endorsed]: Filed April 30, 1954.

[Title of Court of Appeals and Cause.]

**STIPULATION AS TO ITEMS IN RECORD ON
APPEAL TO BE PRINTED BY THE CLERK**

It is hereby stipulated by and between the parties hereto that the printed record on appeal herein shall consist of the following items. The instrument numbers referred to hereinafter are the numbers by which the Clerk of the District Court, in his certificate transmitting all of the original file in this cause to this Court, identified each of the documents and papers therein. Said instrument numbers appear also at the lower right hand corner on the face of each of such instruments in said original file.

1. Amended Complaint and Exhibits "A" and "B" attached thereto and incorporated by reference therein (Instrument No. 12, filed February 19, 1954).

2. The following portions of the Transcript of the Court's Oral Remarks in the proceedings in the District Court on January 18, 1954, at Seattle, at which time a hearing was had on the Government's Motion to Dismiss the original Complaint (Instrument No. 11, filed February 20, 1954):

(a) Pages 1 through 11, inclusive (Note—omit from printing pages 12 through 15, inclusive, of said Transcript as filed in this cause on January 20, 1954, and substitute in lieu thereof the following item (b));

(b) Substitute page 12 bearing the court re-

porter's certificate (Note—this substitute page 12 was filed by the court reporter at counsel's request subsequent to January 20, 1954, but was filed so as to be included as a part of Instrument No. 11).

3. All of the Transcript of Proceedings in the District Court on February 27, 1954, at Tacoma, at which time a hearing was had on the Government's oral motion to dismiss the Amended Complaint (Instrument No. 15, filed March 24, 1954), excepting only the following portions thereof:

(a) Omit that portion which commences at the start of line 10 on page 4 and terminates at the end of line 8 on page 6.

(b) Omit that portion which commences at the start of line 17 on page 23 and terminates at the end of line 24 on page 24.

(c) Omit that portion which commences at the start of line 9 on page 25 and terminates at the end of line 19 on page 25.

4. Oral Motion to Dismiss Amended Complaint. This motion was made during the February 27, 1954, hearing and is found in the Transcript of Proceedings thereof (Instrument No. 15 and item No. 3 above) on page 7, lines 1 through 11.

5. Order Granting Motion to Dismiss entered on March 1, 1954 (Instrument No. 14, filed February 27, 1954).

6. Notice of Appeal (Instrument No. 16, filed March 24, 1954).

7. Order Authorizing Clerk to Transmit Original Exhibits to Court of Appeals (Instrument No. 19, filed April 8, 1954).

8. Statement of Points on Which Appellant Intends to Rely (mailed to you herewith in accordance with Rule 17(6)).

9. This Stipulation as to Items in Record on Appeal to be Printed by the Clerk.

Dated this 27th day of April, 1954.

CHARLES P. MORIARTY,

U. S. Attorney;

By /s/ F. N. CUSHMAN,

Assistant United States
Attorney.

HOLMAN, MICKELWAIT, MARION, BLACK &
PERKINS,

/s/ LUCIEN F. MARION,

/s/ BURROUGHS B. ANDERSON,
Attorneys for Appellant.

[Endorsed]: Filed April 30, 1954.

[fol. 78] PROCEEDINGS IN UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[fol. 79] Before: BONE, ORR and HASTIE, Circuit Judges

ORDER OF SUBMISSION—July 25, 1955

Ordered appeal herein argued by Mr. Lucien F. Marion, counsel for the Appellant, and by Mr. Alan S. Rosenthal, Attorney, Department of Justice, counsel for the Appellee, and submitted to the Court for consideration and decision, with leave to counsel for the Appellee to file a reply memorandum in ten days.

[fol. 80] UNITED STATES COURT OF APPEALS FOR THE NINTH
CIRCUIT

Before: BONE, ORR and HASTIE, Circuit Judges

ORDER DIRECTING FILING OF OPINION AND FILING AND
RECORDING OF JUDGMENT—September 1, 1955

Ordered that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the Clerk, and that a Judgment be filed and recorded in the minutes of the Court in accordance with the opinion rendered.

[fol. 81] UNITED STATES COURT OF APPEALS FOR THE NINTH
CIRCUIT

No. 14,329

RAYONIER INCORPORATED, a Corporation, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee

Appeal from the United States District Court for the
Western District of Washington, Northern Division

OPINION—September 1, 1955

Before: BONE, ORR and HASTIE, Circuit Judges

ORR, Circuit Judge

Appellant filed an original and amended complaint in the trial court seeking to recover damages against the United States. The amended complaint, says appellant, alleges a cause of action within the area in which the United States has waived its sovereign immunity from suit under the Federal Tort Claims Act, 28 U.S.C.A. §§ 2671-2680, § 1346. The damages claimed are for property losses.

On motion the trial court dismissed the action on the ground that the complaint failed to state a claim against the United States on which relief can be granted.

We summarize the pertinent allegations of the amended complaint. Appellee, hereafter Government, is and was at all material times the owner of vast timber forests situate on the Olympic Peninsula of the State of Washington. These forests are administered and patrolled by the Forest Service, a branch of the Department of Agriculture. The Port Angeles Western Railroad is the owner of various railroad rights of way across the public lands, which rights [fol. 82] of way are subject to a right of "control" and "free access" held by the United States. Appellant, hereafter Rayonier, is a Delaware corporation with extensive timberland holdings in the State of Washington, principally on the Olympic Peninsula.

On August 6, 1951, sparks emitted by a passing locomotive

ignited a fire along the railroad's right of way. The Chief United States Forest Ranger was immediately notified and assumed control of the fire fighting activities, which control he continued to exercise during the entire period of fire fighting. The fire spread first to sixty acres of public land, where it was confined until August 7th. It then flared up and spread to a 1600-acre tract, not alleged to be government owned. By August 11th the fire was "contained and controlled". It smouldered in the 1600-acre tract until September 20th. On September 20th it flared up again, escaped from the 1600-acre area and caused the alleged injuries to Rayonier's land.

It is further alleged that the Chief Forest Ranger committed numerous wrongful acts and omissions in the course of fighting the fire on the 1600-acre tract. The amended complaint avers that he failed to employ sufficient men and equipment although there was an ample supply available, and that the proper utilization of such available man power and material would have resulted in the extinguishment of the fire.

In addition, Rayonier seeks to predicate liability on the Government's alleged negligent failure to maintain the roadbed of the railroad in safe condition, its failure to maintain adjoining public lands in safe condition, its failure to perform the fire fighting duties required of a landowner, and its failure to fight the fire according to the duty of care which the law requires of a volunteer.

The crux of our inquiry is whether the allegations of the amended complaint brings the case within the ambit of the Tort Claims Act. The trial court in deciding that they do not relied upon the holding in the case of *Dalehite v. United States*, (1953) 346 U.S. 15. While much is alleged as to the origin of the fire, negligence of the United States in failing to keep the railroad right of way clear of inflammable matter as well as negligence in failing to control the early [fol. 83] spread of the fire, we read the amended complaint in its entirety as picturing a situation wherein the operation occurring after the fire had spread to the 1600-acre plot is determinative of the liability of the Government, if any. The fire, after reaching the 1600-acre tract, smouldered for more than a month, flared up again and reached appellant's

property. In our opinion it was this recurrence of fire on the 1600-acre tract which was the sole proximate cause of the injury to appellant's property and that risks, if any, created by the acts or omissions of agencies of the Government prior to the containment of the fire in the 1600-acre area had terminated.¹ Here the complaint alleges that the fire was "contained and controlled." It is alleged that men, equipment and water, for more than a month, were available to extinguish it. Failure to extinguish the fire is alleged to be due to the negligent refusal to employ the available resources and to use ordinary judgment. Paragraph XXXII of the complaint states that:

"The fire and all burning material within the 1600-acre area and especially in the westerly portion of said area and in the landing described in paragraph XXI above could have been completely extinguished between the dates of August 11 and September 19, 1951 and the fire which broke loose on September 20, 1951, could have been avoided, by the use and employment of more men, tools, equipment, water and supplies, and such men, tools, equipment, water and supplies were available and could have been so used and employed by the District Ranger Floe and his subordinates."

On these facts, liability may not be predicated on conduct occurring before the spread of the fire to the 1600-acre tract.

Having reached the conclusion that failure to completely extinguish the fire after it had been contained within the [fol. 84] 1600-acre tract for approximately six weeks was the sole proximate cause of the injuries to appellant's prop-

¹ "In general, when a third person becomes aware of the danger, and is in a position to deal with it, the defendant will be free to assume that he would act reasonably." Prosser, *Torts*, 1941, 367; *Cook v. Seidenberg*, 1950, 36 Wash. 2d 256, 217 P.2d 799; see, *Crowley v. City of Raymond*, 1939, 98 Wash. 432, 88 P.2d 858; *Lehman v. Marryott and Spencer Logging Company*, 1919, 184 P. 323. Cf. *Pittsburg Reduction Co. v. Horton*, 1908, 87 Ark. 576, 113 S.W. 647, and *Ryan v. New York Central R.R. Co.*, 1866, 35 N.Y. 210, 91 Am.Dec. 49.

erty, we now give attention to the allegation that the failure to completely extinguish and contain the fire within said tract was due to the negligence of the fire fighters. These men were Forest Service Employees and functioning as public firemen. Under the circumstances was their employment such as to render the Government liable in the same manner and to the same extent as a private individual would be and thus within the provision of the Tort Claims Act, 28 U.S.C.A. § 2674?

In the *Dalehite* case, *supra*, the Supreme Court construed the act with reference to an analogous fact situation. There suit was brought to recover damages for negligence on the part of government officials in the manufacture and shipment of ammonium nitrate fertilizer. The fertilizer exploded while stored aboard ship in the harbor of Texas City, Texas. The Coast Guard attempted to put out the fire but failed. It was charged with taking inadequate measures to control the blaze. The Supreme Court denied relief. We set forth a portion of the opinion of the Supreme Court:

"As to the alleged failure in fighting the fire, we think this too without the Act. The Act did not create new causes of action where none existed before.

"'. . . the liability assumed by the Government here is that created by "all the circumstances," not that which a few of the circumstances might create. We find no parallel liability before, and we think no new one has been created by, this Act. Its effect is to waive immunity from recognized causes of action and was not to visit the Government with novel and unprecedented liabilities.' *Feres v. United States*, 340 U.S. 135, 142.

"It did not change the normal rule that an alleged failure or carelessness of public firemen does not create private actionable rights. Our analysis of the question is determined by what was said in the *Feres* case. See 28 U.S.C. §§ 1346 and 2674. The Act, as was there stated, limited United States liability to 'the same manner and to the same extent as a private individual under like circumstances.' 28 U.S.C. § 2674. Here, as there, there is no analogous liability; in fact, if anything is doctrinally sanctified in [fol. 85] the law of torts it is the immunity of communi-

ties and other public bodies for injuries due to fighting fire. This case, then, is much stronger than *Feres*. We pointed out only one state decision which denied government liability for injuries incident to service to one in the state militia. That cities, by maintaining fire-fighting organizations, assume no liability for personal injuries resulting from their lapses is much more securely entrenched. The Act, since it relates to claims to which there is no analogy in general tort law, did not adopt a different rule. See *Steitz v. City of Beacon*, 295 N.Y. 51, 64 N.E. 2d 704. To impose liability for the alleged non-feasance of the Coast Guard would be like holding the United States liable in tort for failure to impose a quarantine for, let us say, an outbreak of foot-and-mouth disease."

The control of conflagrations on forest lands is as much a public function as the fighting of shipboard fires or of pestilence in time of epidemics. We conclude that the Forest Rangers in fighting the fire acted in the capacity of public firemen. The Forest Service engages in extensive fire protection programs. It assists state foresters by subsidies and consultation; it conducts nationwide fire prevention campaigns; it carries on extensive research into techniques and devices for fire prevention and suppression. The service has entered into several agreements similar to the one alleged to be in force here whereby it assumes the state function of suppressing fires on all lands within a particular area, whether publicly or privately owned. We see no distinction between non-liability of the United States for negligence of the Coast Guard in fighting fires and analogous negligent conduct by the Forest Service. In our opinion the *Dalehite* case compels the conclusion that the Government, when intervening in the prevention and control of forest fires, may not be said to assume the common law obligation of a volunteer.

We do not regard the fact that the United States had by prior agreement with the State of Washington undertaken to protect against forest fires as creating a distinction, rendering the *Dalehite* case inapplicable. In entering into the agreement, even if it be considered a binding contract (the complaint falls short of alleging a binding contract, and there is no allegation of consideration for the

Government's promise) the Government did no more than [fol. 86] undertake to perform services in a public capacity. Cf. *National Manufacturing Co. v. United States*, 8 Cir. 1954, 210 F.2d 263.

Having concluded that the alleged neglect of the firemen to use reasonable methods to control the fire within the 1600-acre tract was the proximate cause of the spread of the fire to appellant's lands, and that inasmuch as the fire fighters were acting as public servants to the extent that their activities were without the area of the waiver of sovereign immunity contained in the Tort Claims Act, we might well conclude this opinion. But Rayonier makes other claims which we proceed to discuss.

The principal allegations in this respect relate to the failure of the Government to keep the railroad right of way (the starting point of the fire) and adjoining public lands free and clear of inflammable material and, once the fire started, failure to take proper precautions to extinguish it before it reached the 1600-acre tract.

It is alleged that liability may be predicated on the Government's failure to maintain the Railroad's right of way in satisfactory condition. The right of way held by the Railroad was at least equivalent to an easement.² Ordinarily the servient estate is under no duty to make repairs, the duty resting on the dominant tenant who alone is liable for injury to third parties."³ The allegation in the com-

² *Great Northern Ry. Co. v. United States*, 1941, 315 U.S. 262;

Himonas v. Denver & R.G.W.R. Co., 10 Cir. 1949, 179 F.2d 171; see also,

Jones, Easements, 1898, § 208;

Tiffany, Real Property, 3rd ed. 1939, § 772, and cases cited.

As stated in *Reed v. Alleghany Co.*, 1938, 330 Pa. 300, 199 Atl. 187, 189.

³ See also, *Herzog v. Grosso*, 1953, 41 Cal.2d 219, 259 P.2d 429;

Strauss v. Thompson, 175 Kan. 98, 259 P.2d 145;

2 *Thompson, Real Property*, 1939, § 680;

3 *Elliot, Railroads*, 1921, § 1750;

Jones Easements, 1898, §§ 821, 831.

plaint that the Government had a right to enter and inspect the right of way does not alter this. Reservation of such a right is not equivalent to an assumption of the obligation to repair and maintain the right of way. The servient tenant does not undertake to clean up such rubble as the Railroad may accumulate. Cases dealing with the law of [fol. 87] landlord and tenant cited by the appellant are not persuasive, for example, see *Appel v. Muller*, 262 N.Y. 278, 186 N.E. 785.

The Government, under the allegations of the complaint, was an adjoining landowner to whose property fire, ignited on the property of a third party, has spread. At common law an adjoining landowner is not liable to third parties for failure to anticipate negligent acts of his neighbor and maintain and utilize his lands accordingly. Rayonier has cited no cases where such a liability was imposed. Cases such as *Prince v. Chehalis Savings and Loan Association*, 1936, 186 Wash. 372, 58 P.2d 290, *aff'd.* 186 Wash. 377, 61 P.2d 1374, cited by Rayonier deal with the liability of a landowner on whose property fire breaks out because of the existence of fire hazards and are distinguishable.

There is a division of authority on the question of whether failure to maintain safe conditions on adjoining land may constitute contributory negligence in a suit by such landowner to recover against the party responsible for the fire. In *Leroy Fibre Co. v. Chi. M. and St. P. Ry.*, 1914, 232 U.S. 340, the United States Supreme Court held as a matter of law that plaintiff's stacking of inflammable flax near a railroad right of way did not constitute contributory negligence. This holding has been cited with approval and applied in recent cases.⁴ Other recent cases apply a different rule.⁵

⁴ See *Atlas Insurance Co., Ltd. v. State*, 102 Cal.App.2d 789, 229 P.2d 13; and

Kleinclaus v. Marin Realty Co., 44 Cal.App.2d 733, 211 P.2d 582.

⁵ See *Stephens v. Mutual Lumber Co.*, 1918, 103 Wash. 1, 173 Pac. 1031, where failure on the part of the adjoining landowner to remove his property after notice of the outbreak of fire was held to bar his recovery, and

Nashville v. Nants, 1933, 167 Tenn. 1, 65 S.W.2d 189.

In *Riley v. Standard Oil Co. of Indiana*, 1934, 214 Wis. 15 252 N.W. 183, liability was imposed upon a person who neither started the fire nor owned the land on which it occurred. The court there accepted the jury's determination that the defendant, who had stored grease and oil in a warehouse next to a wide field of uncut grass despite knowledge that for over a year a fire had smouldered in a peat bog a short distance away, was liable to a plaintiff whose house was set afire by burning particles from [fol. 88] the defendant's warehouse. The defendant was held negligent for failure to cut the grass. That case is an extreme one. The point in question was assumed by the court without reference to authorities or arguments. The law has been traditionally reluctant to visit extensive liabilities on those directly responsible for the occurrence of fire. See *Ryan v. N.Y. Central R.R.Co.*, 1866, 35 N.Y. 210. Cases dealing with contributory negligence are in conflict. In our opinion a failure to maintain safe conditions on property adjoining a railroad right of way does not render one liable for damages because the fire spread across his land to other land.

Appellant cites R.C.W. §§ 76.04.370 and 76.04.450, and §§ 5807 and 5818 Rem. Rev. Stats.⁶ These provisions pur-

⁶ Rem. Rev. Stats. § 5807, and § 5818:

"§ 5807. Cut-over lands as public nuisance—Abatement—Cost as lien—Notice before suit—Excepted lands. Any land in the State of Washington covered wholly or in part by inflammable debris created by logging or other forest operations, land clearing, and/or right of way clearing and which by reason of such condition is likely to further the spread of fire and thereby endanger life or property, shall constitute a fire hazard, and the owner or owners thereof and the person, firm or corporation responsible for its existence are required to abate such hazard. Nothing in this section shall apply to lands for which a certificate of clearance, under section 2 of chapter 207, Laws of 1929 (section 5792-1 of Remington's Revised Statutes; section 2569-1 Pierce's Code), has been issued.

"If the owner or person, firm or corporation responsible for the existence of any such hazard shall refuse, neglect

[fol. 89] port to impose liability on a private landowner for failing to take steps to remedy substandard conditions on his property but have no application here. Secs. 5807 and 5818 impose liability without fault. No defense based on the reasonableness of the conduct proscribed is provided. The Dalehite case, pp. 44, 45, holds that the Federal Tort Claims Act does not waive the immunity of the United States in such actions.⁷

or fail to abate such hazard, the state supervisor of forestry may summarily cause it to be abated and the cost thereof and of any patrol or fire fighting made necessary by such hazard may be recovered from said person, firm or corporation responsible therefor or from the owner of the land on which such hazard existed by an action for debt and said costs shall also be a lien upon said land and may be enforced in the same manner, with the same effect and by the same agencies as the lien provided for in section 3 of chapter 105, Laws of 1917 (section 5806 of Remington's Revised Statutes; section 2581 of Pierce's Code): Provided, That said summary action hereinbefore referred to may be taken only after twenty (20) days' notice in writing has been given to the owner or reputed owner of the land on which the hazard exists either by personal service on said owner or by registered letter addressed to said owner at his last known place of residence."

"§ 5818. Forests and timber protected. All forests and timber upon all lands in the state of Washington, lying west of a line one mile west of the eastern boundary of range ten west of the Willamette Meridian and north of the north boundary lines of Grays Harbor county, shall be protected and preserved from the fire hazard to which they are or may be exposed by reason of the unusual quantity of fallen timber upon such lands. It shall therefore be unlawful for any person, firm, company or corporation, their officers, agents or employees, to do or commit any act which shall expose any of the forests or timber upon such lands to the hazard of fire."

⁷"... there is yet to be disposed of some slight residue of theory of absolute liability without fault. This is reflected both in the District Court's finding that the

In the instant case the amended complaint predicates liability on the failure by the Government to take adequate steps to control the fire when it had spread to public lands and before it reached the 1600-acre tract. We fail to find a case wherein a landowner was held liable to third parties for failure to fight a fire spreading across his land from the land of another. Cases cited by appellant deal with the duties of a landowner on whose property the fire broke out. To hold an intermediate landowner liable for damage to property caused by fire passing over his land, to all parties subsequently damaged notwithstanding the efforts of public firemen to extinguish the fire, would be to impose a harsh rule.

[fol. 90] Sec. 5806 Rem. Rev. Stat. of Washington,^{*} R.C.W. 76.04.380, does not change the common law so as to impose

FGAN constituted a nuisance, and in the contention of the petitioners here. We agree with the six judges of the Court of Appeals, 197 F.2d 771, 776, 781, 786, that the Act does not extend to such situations, though of course well known in tort law generally. It is to be invoked only on a 'negligent or wrongful act or omission' of an employee. Absolute liability, of course arises irrespective of how the tortfeasor conducts himself; it is imposed automatically when any damages are sustained as a result of the decision to engage in the dangerous activity. The degree of care used in performing the activity is irrelevant. But the statute requires a negligent act. So it is our judgment that liability does not arise by virtue either of United States ownership of an 'inherently dangerous commodity' or property or of engaging in an 'extra-hazardous' activity. *United States v. Hull*, 195 F.2d 64, 67."

^{*} § 5806 Rem. Rev. Stat. of Washington, R.C.W. 76.04.380:

"§ 5806. Uncontrolled fires as nuisances—Abatement and lien for cost. Any fire on any forest land in the State of Washington burning uncontrolled and without proper precaution being taken to prevent its spread is hereby declared a public nuisance by reason of its menace to life or property. Any person, firm or corporation responsible for either the starting or the existence of such fire is hereby required to control or extinguish it immediately, without

such a liability. The duty it imposes becomes operative upon the receipt of a written demand. The penalty exacted is reimbursement to the state of expenses incurred by it in fighting activities. A method of securing reimbursement is provided. No liability is placed on the landowner, with or without written notice, to third parties where public fire fighters take inadequate measures in their attempt to subdue the blaze.

The judgment of dismissal is affirmed.

awaiting instruction from a forest officer, and if said responsible person, firm or corporation shall refuse, neglect or fail to do so, the supervisor of forestry or any fire warden or forest ranger acting with his authority, may summarily abate the nuisance thus constituted by controlling or extinguishing the fire and the cost thereof may be recovered from said responsible person, firm or corporation by action for debt and, if the work is performed on the property of the offender, shall also constitute a lien upon said property. Such lien may be filed by the supervisor of forestry in the office of the county auditor and foreclosed in the manner provided by law for the foreclosure of liens for labor and material. It shall be the duty of the prosecuting attorney for the county to bring such action for debt, or to foreclose such lien, upon the request of the supervisor of forestry.

“When a fire occurs in a logging operation, such fire shall be fought to the full limit of available employees, as may be necessary, and such fire fighting shall be continued with the necessary crews in such numbers as are, in the opinion of the state forester, or his authorized deputies, sufficient to bring such fire to a patrol basis, and such fire shall not be left without such fire fighting crew or fire patrol until authority so to do has been granted in writing by the supervisor of forestry, or his authorized deputies.”

[fol. 91] UNITED STATES COURT OF APPEALS FOR THE NINTH
CIRCUIT

No. 14329

RAYONIER INCORPORATED, a Corporation, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee

JUDGMENT—September 1, 1955

Appeal from the United States District Court for the Western District of Washington, Northern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Western District of Washington, Northern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is affirmed.

[File endorsement omitted.]

[fol. 92] UNITED STATES COURT OF APPEALS FOR THE NINTH
CIRCUIT

Before: BONE, ORR and HASTIE, Circuit Judges.

ORDER DENYING PETITION FOR REHEARING EN BANC—October
14, 1955

On consideration thereof, and by direction of the Court, it is ordered that the petition of appellant, filed September 30, 1955, and within time allowed therefor by rule of Court for a rehearing en banc, be, and hereby is denied.

[fol. 93] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 94] UNITED STATES COURT OF APPEALS FOR THE NINTH
CIRCUIT

Before: BONE, ORR and HASTIE, Circuit Judges.

ORDER GRANTING LEAVE TO FILE SECOND PETITION FOR
REHEARING—December 27, 1955

Good cause therefor appearing, it is ordered that leave
be and hereby is granted appellants to file a second petition
for rehearing herein.

No. 14329

**United States Court of Appeals
For the Ninth Circuit**

RAYONIER INCORPORATED, a corporation, *Appellant*,

vs.

UNITED STATES OF AMERICA, *Appellee*.

**UPON APPEAL FROM THE UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION**

SECOND PETITION FOR REHEARING *EN BANC*

**HOLMAN, MICKELWAIT, MARION, BLACK & PERKINS,
LUCIEN F. MARION,
BURROUGHS B. ANDERSON,**

Attorneys for Appellant.

**1006 Hoge Building,
Seattle 4, Washington.**

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United States Court of Appeals

For the Ninth Circuit

<hr/> RAYONIER INCORPORATED, a corporation, <div style="text-align: right; padding-right: 20px;"><i>Appellant,</i></div>	}	No. 14329
vs.		
UNITED STATES OF AMERICA, <div style="text-align: right; padding-right: 20px;"><i>Appellee.</i></div> <hr/>	}	

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT,
 WESTERN DISTRICT OF WASHINGTON,
 NORTHERN DIVISION

SECOND PETITION FOR REHEARING *EN BANC*

To: THE HONORABLE HOMER T. BONE, Circuit Judge,
 THE HONORABLE WILLIAM E. ORR, Circuit Judge,
 THE HONORABLE WILLIAM T. HASTIE, Circuit Judge.

PRAYER

Appellant, aggrieved by this Court's decision affirming dismissal of the complaint and by its denial of petition for rehearing (hereinafter called "first petition"), respectfully petitions again, by leave of Court, for a rehearing *en banc*. This second petition is justified because *Indian Towing Company, Inc., v. United States*, No. 8 in the Supreme Court's October, 1955, term (hereinafter called "*Indian Towing*"), on November 21, 1955, intervened to settle important and relevant federal tort claims questions in a way in conflict with this Court's decision. *Indian Towing* is not reported as this petition is drawn. The full text is set forth in the Appendix hereto and citations herein will be to pages in said Appendix.

REVIEW OF FIRST PETITION

Appellant does not abandon any contentions made in the first petition, but, on the contrary, suggests even more earnestly that the Court now should reconsider the first petition in the light of *Indian Towing*. However, appellant will confine its discussion herein to the grounds for rehearing raised by the intervention of *Indian Towing*.

GROUND FOR REHEARING

Indian Towing

Indian Towing holds that: (a) Municipal immunities do not apply to immunize the Government; (b) the Government may be liable for its negligence in performing even "uniquely governmental functions"; (c) government liability is not predicated on the presence or absence of *identical* private activity; (d) when Government undertakes services, inducing reliance, it will be liable if it fails to perform prudently as a volunteer; and (e) the Government should not be immunized from liability by technical, legalistic obscurities premised on fortuitous circumstances.

To this extent, issues unsettled as of the oral argument on this appeal now are settled by the Supreme Court in the manner appellant urged in this Court and in a way in conflict with this Court's decision.

Indian Towing did not expressly overrule *Dalehite*. However, its holdings are so inconsistent with *Dalehite's* public fireman doctrine and invalidate so specifically and unconditionally the Government's related arguments that the dissenting judges in *Indian Towing* said:

"The overall impression from the majority opinion is that it makes the Government liable under the Act for negligence in the conduct of 'any governmental activity on the 'operational level.' It seems broad enough to

cover all so-called 'uniquely governmental activities.' Logically it may cover negligence in fire fighting, although the *Dalehite* holding on that point is not overruled.⁹ * * * " Appendix p. 28.

Footnote 9 keyed to the foregoing quotation suggests that *Dalehite* now has a very narrow scope, indeed, because it refers to footnote 4 of the opinion of the Court wherein *Workman v. New York City*, 179 U.S. 552, is cited. In the latter case the City of New York was held liable in admiralty for damages occurring when a negligently operated city fire boat, en route to a fire, collided with a private vessel. This would indicate that the public fireman immunity is not as doctrinally sanctified as *Dalehite* suggests and that *Dalehite* now is a questionable authority even in a fire case.

As further evidence that *Dalehite's* public fireman doctrine now has extremely limited scope, the Supreme Court's opinion in *Indian Towing* frames a hypothetical wherein the Government would be held liable if the Coast Guard petty officer inspecting the light negligently had touched a key to an uninsulated wire, producing a spark that caused a fire which burned a barge with cargo.

In a second intervening case, the Supreme Court on December 5, 1955, in *United States v. Union Trust Co.*, No. 296, October Term, 1955, as yet unreported, affirmed *per curiam* 221 F.2d 62 (CADC 1955), holding that the Government may be liable for wrongful death in a plane collision resulting from Government negligence in regulating air traffic at a Government airport. Citation of *Indian Towing* as the sole authority for this decision further indicates that the Supreme Court intends that *Indian Towing* should have increasing and that *Dalehite* should have diminishing precedential value.

Analogous Liability

By quoting at length from *Dalehite's* public fireman doctrine, this Court injected *Feres v. United States*, 340 U.S. 135, into its opinion. Printed Opinion, pp. 4-5; 225 F.2d 642, 645.

Indian Towing conclusively limits *Feres* as follows:

" * * * *Feres* held only that 'the Government is not liable under the Federal Tort Claims Act for injuries to servicemen when the injuries arise out of or are in the course of activity incident to service. Without exception, the relationship of military personnel to the Government has been governed exclusively by federal law.' * * * " Appendix p. 21.

All that is left of *Feres* is a very limited "no analogous liability" doctrine. Insofar as *Dalehite* purported to extend that doctrine to include concepts of municipal immunities and immunities for public and governmental functions, *Dalehite* has been invalidated by *Indian Towing*.

The Government made the same "no analogous liability" argument in this appeal as it did in *Indian Towing*. Ans. Br.. pp. 23-45. The Supreme Court now has invalidated the argument. Now, it makes no difference how unlikely it is that similar private activities may be engaged in. If a private party "under like circumstances" would be liable under Washington law for the negligence alleged in appellant's complaint, the Government, too, will be liable. It makes no difference that Government negligence occurs while it is engaged in activities which private persons ordinarily do not perform. The presence or absence of identical private activity is irrelevant.¹

Note, however, that, even if it were relevant, private parties in forested Oregon and Washington commonly have the

same fire prevention and suppression responsibilities and engage in the same activities as the Forest Service, and private persons may be and sometimes are parties to contracts with the State of Washington or Oregon similar to the one to which the Forest Service was a party. Op. Br. pp. 25, 43; Reply Br. p. 15; and First Petition pp. 9, 17.

Municipal Corporation Law

Underlying *Dalehite*, as another spurious offshoot of *Feres*, is the concept that municipal immunities carry over into federal tort claims law. *Indian Towing* invalidated this concept, too, and cut the ground out from under this Court's

¹ " * * * But the Government contends that the language of §2674 (and the implications of §2680) imposing liability 'in the same manner and to the same extent as a private individual under like circumstances . . . ' must be read as excluding liability in the performance of activities which private persons do not perform. Thus, there would be no liability for negligent performance of 'uniquely governmental functions.' The Government reads the statute as if it imposed liability to the same extent as would be imposed in a private individual 'under the same circumstances.' But the statutory language is 'under like circumstances,' and it is hornbook tort law that one who undertakes to warn the public of danger and thereby induces reliance must perform his 'good samaritan' task in a careful manner.

" * * *

" * * * Moreover, if the United States were to permit the operation of private lighthouses—not at all inconceivable—the Government's basis of differentiation would be gone and the negligence charged in this case would be actionable. Yet there would be no change in the character of the Government's activity in the places where it operated a lighthouse and this Court would be attributing bizarre motives to Congress to assert that it was predicating liability on such a completely fortuitous circumstance—the presence or absence of identical private activity." *Indian Towing*, Appendix pp. 16, 18.

decision in so far as it was based upon the municipal immunity concept.²

This holding was anticipated by this Court in *Air Transport Associates v. United States*, 221 F.2d 467 (CA 9 1955) wherein it was observed that there was no distinction under the Tort Claims Act between Governmental functions termed "sovereign" and those termed "proprietary."

The "Public Function" Argument

Related to the aforementioned theories of immunity now discredited by *Indian Towing* is a separate and distinct Government argument that services and activities performed by the Government in the "public interest" as a "public function" or in a "public capacity" are immune from actions brought under the Act. The argument was made in the case at bar. Ans. Br. pp. 29-38. The reply brief, page 13 *et seq.*, warned against the reader's being conditioned by the repeated use of the word "public" in the answering brief. Under *Dalehite's* authority this Court accepted the argument and adopted the Government's labels. It expressed as follows its reasons for extending *Dalehite* to the case at bar:

"The control of conflagrations on forest lands is as much a *public function* as the fighting of shipboard fires or of pestilence in time of epidemics. * * *

" * * *

² "Furthermore, the Government in effect reads the statute as imposing liability in the same manner as if it were a municipal corporation and not as if it were a private person, and it would thus push the courts into the 'governmental'—'non-governmental' quagmire that has long plagued the law of municipal corporations. * * * The Federal Tort Claims Act cuts the ground from under that doctrine; it is not self-defeating by covertly embedding the casuistries of municipal liability for torts." *Indian Towing*, Appendix p. 16.

" * * * the Government did no more than undertake to perform services in a *public capacity*. * * *

" * * *

"Having concluded that * * * inasmuch as the fire fighters were acting as *public servants* to the extent that their activities were without the area of the waiver of sovereign immunity contained in the Tort Claims Act, we might well conclude this opinion. * * * " Printed Opinion pp. 5, 6; 225 F.2d 642, 645-6.

Indian Towing now declares that there is nothing magic about the word "governmental" or "public" and holds that these labels are invalid substitutes for reasons. Government activity is wholly public. Public-ness alone does not invoke an immunity under 28 U.S.C. §2680 where the only immunities are defined.

"While the area of liability is circumscribed by certain provisions of the Federal Tort Claims Act, see 28 U.S.C. §2680, all Government activity is inescapably 'uniquely governmental' in that it is performed by the Government. * * * this Court stated: 'Government is not partly public or partly private, depending upon the governmental pedigree of the type of a particular activity or the manner in which the Government conducts it.' * * * " *Indian Towing*, Appendix p. 19.

The Court's finding of fact that the negligent Government employees were "public firemen" is at the heart of this case. All phases of Forest Service negligence were immunized directly or indirectly on this single factual premise. Although such a finding may have been proper under *Dalehite* before *Indian Towing*, since *Indian Towing* it is not even relevant because the public quality of Government activity is not a valid basis for immunity.

The Government Can Be Liable as a Volunteer

The amended complaint alleges in paragraph XIV that the Government assumed exclusive control of all fire fighting, inducing plaintiff's reliance that those activities would be performed with ordinary care.³

One of several grounds of liability urged by appellant throughout is the common law liability of the Government as a volunteer. This Court dismissed that contention as follows:

" * * * In our opinion the *Dalehite* case compels the conclusion that the Government, when intervening in the prevention and control of forest fires may not be said to assume the common law obligation of a volunteer." Printed Opinion p. 5; 225 F.2d 642, 646.

Indian Towing held that the Government is liable if, having undertaken to warn the public of danger, inducing reliance, it fails to perform as a volunteer in a careful manner.⁴

³ "Upon being informed of the fire referred to in paragraph XII, District Ranger Floe and his subordinates immediately assumed, took and exercised exclusive supervision, direction and control of all activities in connection with the fighting and suppression of the fires, and at all times thereafter, through and including the times referred to in this complaint, continued to and did assume, take and exercise exclusive supervision, direction and control of the fighting and suppression of all fires referred to in this complaint. Plaintiff, in common with other owners and operators of timber and timberlands in the areas referred to in this complaint, knew of the facts described in this paragraph and relied upon District Ranger Floe and his subordinates to continue to carry on said activities at all times referred to in this complaint." (R. 13, 14)

⁴ "The Coast Guard need not undertake the lighthouse service. But once it exercised its discretion to operate a light on Chandeleur Island and engendered reliance on the guidance

The Forest Service need not undertake the fire protection activity. But once it exercised its discretion to assume exclusive supervision direction and control of all activities in connection with the fighting and suppression of the fires and engendered reliance by appellant and other owners and operators of timber in the area, it was obligated to use due care. If the Forest Service failed in its duty and damage was thereby caused to appellant, the United States is liable under the Tort Claims Act.

Pre-August 11 Negligence

Appellant suggests that *Indian Towing* requires a reconsideration of the Court's opinion with respect to pre-August 11 conditions, practices, acts and omissions because:

1. *Indian Towing* says that the Government has the same liability as a private party who volunteers. Under one theory of negligence by which this complaint should be judged, the Government was a volunteer at all stages of the fire, irrespective of whose land the fire was on.

2. The Court's opinion indicates that it was influenced in part by a technical concept of title to and control of various lands. It emphasizes that the fire originated on the railroad right-of-way, spread across Government land onto private land and was contained in a smoldering condition on land "not alleged to be Government owned." A spreading fire

afforded by the light, it was obligated to use due care to make certain that the light was kept in good working order, and if the light did become extinguished, then the Coast Guard was further obligated to use due care to discover this fact and to repair the light or give warning that it was not functioning. If the Coast Guard failed in its duty and damage was thereby caused to petitioners, the United States is liable under the Tort Claims Act." *Indian Towing*, Appendix pp. 10-11.

does not respect boundary lines or land titles. Its movement depends upon weather, wind, topography and other circumstances the fortuitous character of which has no legal significance under 28 U.S.C. §2680, according to *Indian Towing*. Under *Indian Towing* it matters not whether successive acts and omissions were governmental in character or were performed on private land or on Government land. The Supreme Court said that it would be attributing bizarre motives to Congress to assert that Government liability or immunity should be predicated on such inconsequential and fortuitous circumstances as the time and place of the negligent act when the general character of the Government's service or activity does not change. Appendix p. 18.

3. The Court indicated that Washington statutes establishing standards of care impose absolute liability and are not applicable to the Government in the same fashion as they apply to private individuals. To the contrary, see *State of Washington v. Canyon Lumber Corp.*, 146 Wash. Dec. 648, 284 P.2d 316. And *Indian Towing* bears on this question because it emphasizes that the proper test of liability is whether a private individual under like circumstances would be liable. Private persons have been held civilly liable under Sections 5806 and 5807; RCW 76.04.370 and 380. *Conrad v. Cascade Timber Co.*, 166 Wash. 369, 7 P.2d 19.⁵

⁵ See also: *Kuehn v. Dix*, 42 Wash. 532, 85 Pac. 43; *Jordan v. Welsh*, 61 Wash. 569, 112 Pac. 656; *Galbraith v. Wheeler-Osgood Co.*, 123 Wash. 229, 212 Pac. 174; *Wood & Iverson, Inc., v. Northwest Lumber Co.*, 138 Wash. 203, 244 Pac. 712; *Walters v. Mason County Logging Co.*, 139 Wash. 265, 246 Pac. 749; *Mensick v. Cascade Timber Co.*, 144 Wash. 528, 258 Pac. 323.

CONCLUSION

This Court's September 1, 1955, decision now should be reconsidered fully in the light of *Indian Towing* and *Union Trust Co.* The current importance of settling doubtful areas of federal tort liability alone is sufficient reason for a rehearing of this cause. The local importance of Government liability for negligence in managing its forest, the most important of which are located within the jurisdiction of this Court, suggests a rehearing before the full bench.

In every stage in this litigation appellant has asked the following question. It is unanswered by Government counsel. It was disregarded by the District Court. No mention of it was made in this Court's opinion. If this question is answered fairly in the light of *Indian Towing* on a rehearing before this Court sitting *en banc*, it will serve as the key to the correct result in this important federal tort claims issue.

"Let us assume that the positions of the parties to this lawsuit were exactly transposed, that is, that the United States was the plaintiff and Rayonier the defendant, and that the conditions, acts and omissions described in the Complaint were those created, tolerated or committed by Rayonier and its employees. Is there any reason in fact or in law why the positions of the parties could not be transposed in all material respects and, in such example, would Rayonier be liable to the United States?"

Respectfully submitted,

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Attorneys for Appellant.

CERTIFICATE OF COUNSEL

Lucien F. Marion and Burroughs B. Anderson certify hereby that they are counsel for appellant herein; that appellant makes the foregoing Petition for Rehearing *En Banc* in good faith and that, in their judgment and in the judgment of each of them, the said petition is well founded and is not interposed for delay.

LUCIEN F. MARION,

BURROUGHS B. ANDERSON,

Attorneys for Appellant.

APPENDIX

SUPREME COURT OF THE UNITED STATES**No. 8 — OCTOBER TERM, 1955****INDIAN TOWING COMPANY, INC.,*****Petitioner,*****vs.****UNITED STATES OF AMERICA****ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT****[November 21, 1955]**

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

Petitioners brought suit in the United States District Court for the Southern District of Mississippi, seeking recovery under the Federal Tort Claims Act, 28 U. S. C. §1346 (b), for damages alleged to have been caused by the negligence of the Coast Guard in the operation of a lighthouse light. They alleged that on October 1, 1951, the tug Navajo, owned by petitioner Indian Towing Company, was towing Barge AS-16, chartered by petitioner Upper Mississippi Towing Corporation; that the barge was loaded with a cargo of triple super phosphate, consigned to petitioner Minnesota Farm Bureau Service Company and insured by petitioner United Firemen's Insurance Company; that the tug Navajo went aground on Chandeleur Island and as a result thereof sea water wetted and damaged the cargo to the extent of \$62,659.70; that the consignee refused to accept the cargo; that petitioners Indian Towing Company and Upper Mississippi Towing Corporation therefore became responsible for the loss of the cargo; and that the loss was paid by petitioner

United Firemen's Insurance Company under loan receipts. The complaint further stated that the grounding of the Navajo was due solely to the failure of the light on Chandeleur Island which in turn was caused by the negligence of the Coast Guard. The specific acts of negligence relied on were the failure of the responsible Coast Guard personnel to check the battery and sun relay system which operated the light; the failure of the Chief Petty Officer who checked the light-house on September 7, 1951, to make a proper examination of the connections which were "out in the weather"; the failure to check the light between September 7 and October 1, 1951; and the failure to repair the light or give warning that the light was not operating. Petitioners also alleged that there was a loose connection which could have been discovered upon proper inspection.

On motion of the respondent the case was transferred to the United States District Court for the Eastern District of Louisiana, New Orleans Division. Respondent then moved to dismiss on the ground that it had not consented to be sued "in the manner in which this suit is brought" in that petitioners' only relief was under the Suits in Admiralty Act, 41 Stat. 525, or the Public Vessels Act, 43 Stat. 1112. This motion was granted and the Court of Appeals for the Fifth Circuit affirmed *per curiam*. 211 F. 2d 886. Because the case presented an important aspect of the still undetermined extent of the Government's liability under the Federal Tort Claims Act, we granted certiorari, 348 U. S. 810. The judgment of the Court of Appeals was affirmed by an equally divided Court, 349 U. S. 902, but a petition for rehearing was granted, the earlier judgment in this Court vacated, and the case restored to the docket for reargument before the full Bench. 349 U. S. 926.

The relevant provisions of the Federal Tort Claims Act are 28 U.S.C. §§1346 (b), 2674, and 2680 (a):

§1346 (b). " . . . the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

§2674. "The United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages."

§2680. "The provisions of this chapter and section 1346(b) of this title shall not apply to—

"(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."

The question is one of liability for negligence at what this Court has characterized the "operational level" of governmental activity. *Dalehite v. United States*, 346 U. S. 15, 42. The Government concedes that the exception of §2680 relieving from liability for negligent "exercise of judgment" (which is the way the Government paraphrases a "discre-

tionary function" in §2680 (a)) is not involved here, and it does not deny that the Federal Tort Claims Act does provide for liability in some situations on the "operational level" of its activity. But the Government contends that the language of §2674 (and the implications of §2680) imposing liability "in the same manner and to the same extent as a private individual under like circumstances . . ." must be read as excluding liability in the performance of activities which private persons do not perform. Thus, there would be no liability for negligent performance of "uniquely governmental functions." The Government reads the statute as if it imposed liability to the same extent as would be imposed on a private individual "under the same circumstances." But the statutory language is "under like circumstances," and it is hornbook tort law that one who undertakes to warn the public of danger and thereby induces reliance must perform his "good samaritan" task in a careful manner.

Furthermore, the Government in effect reads the statute as imposing liability in the same manner as if it were a municipal corporation and not as if it were a private person, and it would thus push the courts into the "governmental"—"non-governmental" quagmire that has long plagued the law of municipal corporations. A comparative study of the cases in the forty-eight States will disclose an irreconcilable conflict. More than that, the decisions in each of the States are disharmonious and disclose the inevitable chaos when courts try to apply a rule of law that is inherently unsound. The fact of the matter is that the theory whereby municipalities are made amenable to liability is an endeavor, however awkward and contradictory, to escape from the basic historical doctrine of sovereign immunity. The Federal Tort Claims Act cuts the ground from under that doctrine; it is not self-

defeating by covertly embedding the casuistries of municipal liability for torts.¹

While the Government disavows a blanket exemption from liability for all official conduct furthering the "uniquely governmental" activity in any way, it does claim that there can be no recovery based on the negligent performance of the activity itself, the so-called "end-objective" of the particular governmental activity. Let us suppose that the Chief Petty Officer going to inspect the light on Chandeleur Island first negligently ran over a pedestrian in a Coast Guard car; later, while he was inspecting the light, he negligently tripped over a wire and injured someone else; he then forgot to inspect an outside connection and that night the patently defective

¹ A good illustration of the effort of a conscientious court to reconcile the irreconcilable is *Haley v. City of Boston*, 191 Mass. 291, 77 N. E. 888. For an example of the confusion prevailing in one jurisdiction, compare *District of Columbia v. Woodbury*, 136 U. S. 450 (municipal corporation liable for injuries caused by negligent failure to keep sidewalk in repair) with *Harris v. District of Columbia*, 256 U. S. 650 (municipal corporation not liable for injuries caused by negligent sprinkling of streets). But even in the law of municipal corporation and state liability, one State at least has sought to emerge from the quagmire. See the more recent New York cases: *Foley v. State of New York*, 294 N. Y. 275, 62 N. E. 2d 69 (State liable when negligent failure to replace burned-out bulb in traffic light caused accident); *Bernardine v. City of New York*, 294 N. Y. 361, 62 N. E. 2d 604 (city liable in negligence action for damages caused by runaway police horse). When the confused law of municipal corporations is applied to the Tort Claims Act, the same type of results occur. Compare the holding of the Court of Appeals for the Fifth Circuit in the instant case, 211 F. 2d 886, with its holding in *United States v. Lawter*, 219 F. 2d 559 (United States liable under Tort Claims Act for negligence of Coast Guard during helicopter rescue operation).

connection broke and the light failed, causing a ship to go aground and its cargo of triple super phosphate to get wet; finally the Chief Petty Officer on his way out of the lighthouse touched a key to an uninsulated wire to see that it was carrying current, and the spark he produced caused a fire which sank a nearby barge carrying triple super phosphate. Under the Government's theory, some of these acts of negligence would be actionable, and some would not. But is there a rational ground, one that would carry conviction to minds not in the grip of technical obscurities, why there should be any difference in result? The acts were different in time and place but all were done in furtherance of the officer's task of inspecting the lighthouse and in furtherance of the Coast Guard's task in operating a light on Chandeleur Island. Moreover, if the United States were to permit the operation of private lighthouses—not at all inconceivable—the Government's basis of differentiation would be gone and the negligence charged in this case would be actionable. Yet there would be no change in the character of the Government's activity in the places where it operated a lighthouse and this Court would be attributing bizarre motives to Congress to assert that it was predicating liability on such a completely fortuitous circumstance—the presence or absence of identical private activity.²

² Although the argument is more elaborately presented here, this is not the first statute which the Government has attempted to construe in this manner. The Suits in Admiralty Act, 41 Stat. 525, provided that a libel *in personam* could be brought against the United States for damage caused by a Government-owned merchant vessel or tug in cases "where if such vessel were privately owned or operated . . . a proceeding in admiralty could be maintained . . ." and stated that "[s]uch suits shall proceed and shall be heard and determined according to the principles of law and to

While the area of liability is circumscribed by certain provisions of the Federal Tort Claims Act, see 28 U. S. C. §2680, all Government activity is inescapably "uniquely governmental" in that it is performed by the Government. In a case in which the Federal Crop Insurance Corporation, a wholly Government-owned enterprise, was sought to be held liable on a crop insurance policy on the theory that a private insurance company would be liable in the same situation, this Court stated: "Government is not partly public or partly private, depending upon the governmental pedigree of the type of a particular activity or the manner in which the Government conducts it." *Federal Crop Insurance Corp. v. Merrill*, 332 U. S. 380, 383-384. On the other hand, it is hard to think of any governmental activity on the "operational level," our present concern, which is "uniquely governmental," in the sense that its kind has not at one time or another been, or could not conceivably be, privately performed.

There is nothing in the Tort Claims Act which shows that

the rules of practice obtaining in like cases between private parties." In *Eastern Transportation Company v. United States*, 272 U. S. 675, an action was brought under the Act to recover damages for the loss of a ship and cargo by collision with an unmarked wreck of a sunken Government-owned merchant vessel. The Government moved to dismiss the action on the ground, *inter alia*, that "The said alleged cause of action set out in the said libel relates to an alleged failure on the part of the officers and/or agents of the United States to perform a purely governmental function or to alleged negligence of such officers and/or agents in the performance of a purely governmental function; and gives rise to no liability on the part of the United States of America for which they are suable in the United States Court or elsewhere." The motion to dismiss was granted on another ground but on appeal the Supreme Court rejected all arguments that the district court lacked jurisdiction and reversed the judgment of the district court.

Congress intended to draw distinctions so finespun and capricious as to be almost incapable of being held in the mind for adequate formulation. The statute was the product of nearly thirty years of congressional consideration and was drawn with numerous substantive limitations and administrative safeguards. (For substantive limitations, see §2680 (a)-(m).³ For administrative safeguards, see §2401 (b) (statute of limitations); §2402 (denial of trial by jury); §2672 (administrative adjustment of claims of \$1,000 or less); §2673 (reports to Congress); §2674 (no liability for punitive damages or for interest prior to judgment); §2675 (disposition by federal agency as prerequisite to suit when claim is filed); §2677 (compromise); §2679 (exclusiveness of remedy).) The language of the statute does not support the Government's argument. Loose general statements in the legislative history to which the Government points seem directed mainly toward the "discretionary function" exemption of §2680 and are not persuasive. The broad and just purpose which the statute was designed to effect was to compensate the victims of negligence in the conduct of governmental activities in circumstances like unto those in which a private person would be liable and not to leave just treatment to the caprice and legislative burden of individual private laws. Of course, when dealing with a statute subjecting the Government to liability for potentially great sums of money, this Court must not promote profligacy by careless construction. Neither should it as a self-constituted guardian

³ Congress significantly withheld liability for claims relating, *inter alia*, to the postal service, tax collection, quarantine establishment, fiscal operations, combatant activities of the Coast Guard during time of war, and the activities of the TVA.

of the Treasury import immunity back into a statute designed to limit it.

The Coast Guard need not undertake the lighthouse service. But once it exercised its discretion to operate a light on Chandeleur Island and engendered reliance on the guidance afforded by the light, it was obligated to use due care to make certain that the light was kept in good working order, and if the light did become extinguished, then the Coast Guard was further obligated to use due care to discover this fact and to repair the light or give warning that it was not functioning. If the Coast Guard failed in its duty and damage was thereby caused to petitioners, the United States is liable under the Tort Claims Act.

The Court of Appeals for the Fifth Circuit considered *Feres v. United States*, 340 U. S. 135, and *Dalehite v. United States*, 346 U. S. 15, controlling. Neither case is applicable. *Feres* held only that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen when the injuries arise out of or are in the course of activity incident to service. Without exception, the relationship of military personnel to the Government has been governed exclusively by federal law." 340 U. S., at 146. And see *Brooks v. United States*, 337 U. S. 49. The differences between this case and *Dalehite* need not be labored. The governing factors in *Dalehite* sufficiently emerge from the opinion in that case.⁴

The judgment of the Court of Appeals is reversed and the

⁴The Court in *Dalehite* disposed of a claim of liability for negligence in connection with fire fighting by finding that "there is no analogous liability . . ." in the law of torts. 346 U. S., at 44. But see *Workman v. New York City*, 179 U. S. 552.

case is remanded to the District Court for further proceedings.

MR. JUSTICE REED, with whom MR. JUSTICE BURTON, MR. JUSTICE CLARK, and MR. JUSTICE MINTON join, dissenting.

The Court reverses the judgment on the ground that the United States is liable under the Federal Tort Claims Act for damages caused by the negligence of the Coast Guard in maintaining a lighthouse light near the mouth of the Mississippi. The alleged negligence was the failure of the Coast Guard personnel to check the electrical system which operated the light, the failure to make a proper examination of the connections and other apparatus connected with the light, and the failure to repair the light or give notice to vessels that the light was not functioning. Although navigators were warned this was an "unwatched light," it is assumed at this point in the litigation that this negligence occurred and that it was the proximate cause of the loss. Government operation of the lighthouse was authorized by 14 U. S. C. §81. It is forbidden to others except by authority of the Coast Guard.²

¹ United States Coast Guard, Light List, *Atlantic and Gulf Coasts of the United States*, corrected to January 1, 1951 (C. G. 158), pp. 5, 498.

² 14 U. S. C. §83:

"No person, or public body, or instrumentality, excluding the armed services, shall establish, erect, or maintain any aid to maritime navigation without first obtaining authority to do so from the Coast Guard in accordance with applicable regulations. Whoever violates the provisions of this section or any of the regulations issued by the Secretary in accordance herewith shall be guilty of a misdemeanor and shall be

The question of the liability of the United States for this negligence depends on the scope and meaning of the Federal Tort Claims Act. The history of the adoption of that Act has heretofore been thoroughly explained.³ Before its enactment,

fined not more than \$100 for each offense. Each day during which such violation continues shall be considered as a new offense."

The Government advises that as of June 30, 1953, government aids to navigation numbered 38,169; authorized private aids 3,301. Aids to Navigation Operated and Maintained by the United States and Coast Guard (June 30, 1953) pp. 1, 12.

We are further advised:

"The Coast Guard in its manual on aids to navigation gives these examples of typical aids considered in the category of private aids [U. S. Coast Guard, *Aids to Navigation* (C. G. 127, 1945) p. 1201]:

"(1) Standard buoy and lighting equipment employed by the United States Engineers to mark dredging areas.

"(2) Buoys, ranges and sound signals in channels dredged by private corporations to their property, which channels are used exclusively by the corporation's, or its contractor's, vessels.

"(3) Aids established by the Army and Navy for their own use in connection with the approaches to loading piers, etc.

"See also, U. S. Coast Guard, *Aids to Navigation Manual* (CG-222, Jan. 1953), pp. 4-1, 4-3.

"Coast Guard regulations require all persons owning, occupying, or operating bridges over the navigable waters of the United States to maintain at their own expense such lights required for the safety of marine navigation as may be prescribed by the Commandant. 33 C. F. R. (1949 ed.) §68.01-1. In addition, there is a non-delegable duty imposed upon the owner of a sunken wreck to mark it. 33 U. S. C. 409; 33 C. F. R. (1949 ed.) 64.01-1."

³ *Feres v. United States*, 340 U. S. 135; *Dalehite v. United States*, 346 U. S. 15.

the immunity of the Government from such tort actions was absolute. The Act authorized suits against the Government under certain conditions. The Government was made liable for injury to persons or property

“caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.” 28 U. S. C. §1346 (b).

There was a further condition, 28 U. S. C. §2674, that the United States should be liable “in the same manner and to the same extent as a private individual under like circumstances.”⁴

In *Feres v. United States*, 340 U. S. 135, we passed upon the applicability of the Act to claims by members of the armed services injured through the negligence of other military personnel.⁵ We said:

“One obvious shortcoming in these claims is that plaintiffs can point to no liability of a ‘private individual’ even remotely analogous to that which they are asserting against the United States. We know of no American law which ever has permitted a soldier to recover for negligence, against either his superior officers or the Government he is serving. Nor is there any liability ‘under like circumstances,’ for no private individual has power to conscript or mobilize a private army with such

⁴ There were further limitations and certain specific exceptions not pertinent here.

⁵ *E. g.*, the negligence of an army surgeon during an operation in sewing up a towel in the abdomen of a soldier; and negligence in quartering a soldier in barracks known to be unsafe because of a defective heating plant.

authorities over persons as the Government vests in echelons of command. . . . In the usual civilian doctor and patient relationship, there is of course a liability for malpractice. And a landlord would undoubtedly be held liable if an injury occurred to a tenant as the result of a negligently maintained heating plant. But the liability assumed by the Government here is that created by 'all the circumstances,' not that which a few of the circumstances might create. We find no parallel liability before, and we think no new one has been created by, this Act. Its effect is to waive immunity from recognized causes of action and was not to visit the Government with novel and unprecedented liabilities." *Id.*, at 142.

Thus, in *Feres* the Court was of the view that the Act does not create new causes of action theretofore beyond the applicable law of torts. So, in determining whether an action for negligence in maintaining public lights is permissible, we must consider whether similar actions were allowed by the law of the place where the negligence occurred, prior to the Tort Claims Act, against public bodies otherwise subject to suit.

Dalehite v. United States, 346 U. S. 14, 42, followed the reasoning of *Feres*. That case involved, among other issues, the liability of the United States for negligence of the Coast Guard in fighting fire. The Coast Guard had been found negligent in its fire-fighting duties by the trial court. These duties were outside the discretionary function exception of §2680 (a) of the Act. Resting our decision on the Act itself, we said the Tort Act

"did not change the normal rule that an alleged failure or carelessness of public firemen does not create private actionable rights. Our analysis of the question is determined by what was said in the *Feres* case. See 28 U. S. C. §§1346 and 2674. The Act, as was there stated,

limited United States liability to 'the same manner and to the same extent as a private individual under like circumstances.' 28 U. S. C. §2674. Here, as there, there is no analogous liability; in fact, if anything is doctrinally sanctified in the law of torts it is the immunity of communities and other public bodies for injuries due to fighting fire." *Id.*, at 43-44.

These two interpretive decisions have not caused Congress to amend the Federal Tort Claims Act. As a matter of fact the catastrophe that gave rise to the *Dalehite* case was subsequently presented to Congress for legislative relief by way of compensation for the losses which resulted, as found by the trial court, partly from the negligence of the Coast Guard. Throughout the reports, discussion and enactment of the relief act, there was no effort to modify the Tort Act so as to change the law, in any respect, as interpreted by this Court in *Feres* and *Dalehite*.⁶ Although its discussion was restricted solely to the discretionary function exception to the Act, Congress must have accepted the rulings relating to the issues here involved as in accord with its understanding of the Tort Act. One cannot say that when a statute is interpreted by this Court we must follow that interpretation in subsequent cases unless Congress has amended the statute. On this our cases conflict.⁷ However, we should continue to

⁶ Pub. Law No. 378, 84th Cong., 1st Sess.; H. R. Rep. No. 2024, 83d Cong., 2d Sess.; S. Rep. No. 2363, 83d Cong., 2d Sess.; H. R. Rep. No. 1305, 84th Cong., 1st Sess.; H. R. Rep. No. 1623, 84th Cong., 1st Sess.; S. Rep. No. 684, 84th Cong., 1st Sess.

⁷ Compare *United States v. Elgin R. Co.*, 299 U. S. 492, 500; *United States v. South Buffalo R. Co.*, 333 U. S. 771, 775; *Toolson v. New York Yankees*, 346 U. S. 356, with *Helvering v. Hallock*, 309 U. S. 106; *Commissioner v. Church*, 335 U. S. 632.

hold, as a matter of *stare decisis* and as the normal rule, that inaction of Congress, after a well-known and important decision of common knowledge, is "an aid in statutory construction . . . useful at times in resolving statutory ambiguities." *Helvering v. Reynolds*, 313 U. S. 428, 432. The non-action of Congress should decide this controversy in the light of the previous rulings. The reasons which led to the conclusions against creating new and novel liabilities in the *Feres* and *Dalehite* cases retain their persuasiveness.

This enactment, like any other, should be construed so as to accomplish its purpose, but not with extravagant generosity so as to make the Government liable in instances where no liability was intended by Congress. It is certainly not necessary that every word in a statute receive the broadest possible interpretation. If Congress intended to create liability for all incidents not theretofore actionable against suable public agencies, that intention should be made plain. The courts are not the legislative branch of the Government.

The Act made the Government liable in instances where it would be suable "if a private person." The meaning of "private person" is not discussed in the legislative history. In *Feres* we talked of private liability and came to a conclusion which is contrary to that reached by the Court today. See pp. 3-4, *supra*. We held that because surgeons in private practice or private landlords were liable for negligence did not mean the United States was. Liability of governments for the failure of lighthouse warning lights is as unknown to tort law as, for example, liability for negligence in fire fighting excluded by the *Dalehite* ruling. Lighthouse keeping is as uniquely a governmental function as fire fighting. There is at least some uncertainty and ambiguity as to what Congress meant by making the United States liable in circumstances

where it would be liable "if a private person." That uncertainty should not lead us to accept liability for the United States in this case. In dealing with this enlarged concept of federal liability for torts, wisdom should dictate a cautious approach along the lines of *Feres* and *Dalehite*.

The Act says that the United States shall be liable in accordance with the law of the place where the act or omission occurred. §1346 (b). This alleged tort occurred in Louisiana. Under the Louisiana law a municipal corporation is not responsible for injury sustained as a result of negligence on the part of the employees of a city in the maintenance of traffic lights.⁸ Street traffic lights are a close analogy to navigation lights. We can see no reason to doubt that under Louisiana law the maintenance of navigation lights if permissible by municipalities would likewise be free of liability. The Court warns us against the morass of decisions that involve municipal tort liability. It calls that law a "quagmire" and avoids it by a complete surrender of sovereign immunity without regard to the law of municipal liability of the respective States.

The over-all impression from the majority opinion is that it makes the Government liable under the Act for negligence in the conduct of "any governmental activity on the 'operational level.'" It seems broad enough to cover all so-called "uniquely governmental activities." Logically it may cover negligence in fire fighting, although the *Dalehite* holding on that point is not overruled.⁹ Perhaps liability arises even for injuries from negligence in pursuing criminals.

⁸ *Edwards v. City of Shreveport*, 66 So. 2d 373; cf. *Howard v. City of New Orleans*, 159 La. 443, 105 So. 443.

⁹ But see footnote 3 of the majority opinion in which *Workman v. New York City* is cited.

The Court's literal interpretation of this Act brings about an application of the Federal Tort Claims Act analogous to that condemned by Congress in the Portal to Portal Act of 1947 after *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, see 61 Stat. 84, §1 (a), and in the Fair Labor Standards Amendments of 1949, 63 Stat. 910, after *Bay Ridge Co. v. Aaron*, 334 U. S. 446, see 2 U. S. Code Cong. Serv. (1949) 1617. Compare *United States v. American Trucking Assn's*, 310 U. S. 534. The judgment should be affirmed.

[fol. 96] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 97] UNITED STATES COURT OF APPEALS FOR THE NINTH
CIRCUIT

Before: BONE, ORR and HASTIE, Circuit Judges.

ORDER DENYING SECOND PETITION FOR REHEARING—February 17, 1956

On consideration thereof, and by direction of the Court, it is ordered that the second petition of appellant, filed December 27, 1955, and within time allowed therefor, for rehearing of above cause be, and hereby is denied.

[fol. 98] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 99] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF
CERTIORARI

Upon consideration of the application of counsel for petitioner,

It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including March 12, 1956.

Wm. O. Douglas, Associate Justice of the Supreme
Court of the United States.

Dated this 10th day of January, 1956.

[fol. 100] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed April 23, 1956

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(684-1)

45
No. ~~F45~~

MAR 9 195

HAROLD B. WALLEY,

**In the
Supreme Court of the United States**
OCTOBER TERM, 1955

RAYONIER INCORPORATED, a corporation, *Petitioner,*
vs.
UNITED STATES OF AMERICA, *Respondent.*

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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✶ **LUCIEN F. MARION,**
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Seattle 4, Washington.

✶ **BURBOUGHS B. ANDERSON,**
1006 Hoge Building,
Seattle 4, Washington.

No.....

**In the
Supreme Court of the United States**

OCTOBER TERM, 1955

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vs.

UNITED STATES OF AMERICA, *Respondent*.

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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**In the
Supreme Court of the United States**

OCTOBER TERM, 1955

<hr/> RAYONIER INCORPORATED, a corporation, <div style="text-align:right"><i>Petitioner,</i></div> <div style="text-align:center">vs.</div> UNITED STATES OF AMERICA, <i>Respondent.</i> <hr/>	}	No.....
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**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Petitioner prays that writ of certiorari issue to review the Court of Appeals' judgment entered September 1, 1955.

CITATIONS TO OPINIONS BELOW

The District Court for the Western District of Washington did not write an opinion and its decision is unreported (R. 43, 62).¹ The Court of Appeals' opinion (R. 80-89), Appendix D, *infra*, pp. 53-65, is reported in 225 F.2d 642.

JURISDICTION

The Court of Appeals' judgment was entered September 1, 1955 (R. 90; Appendix E hereto, *infra*, p. 67). Petition for Rehearing, filed September 30, 1955, was denied October 14, 1955 (R. 91). A Second Petition

¹ Portions of the District Court's remarks, selected by stipulation of counsel, appear in "Transcript of Record" (R. 33-36). Nine other copies of said Transcript are filed herein. All of the District Court's oral remarks, separated from colloquy, are printed in Appendix C, *infra*, pp. 41-52.

for Rehearing was filed December 27, 1955, pursuant to leave granted (R. 93) and was denied February 17, 1956 (R. 95). On January 10, 1956, Mr. Justice Douglas extended to March 12, 1956, the time for filing this Petition.

Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Is the United States liable under the Tort Claims Act for negligence of its employees fighting fire on cut-over lands adjacent to forested lands, or is it immune from such liability because of the "public fireman" doctrine stated in *Dalehite v. United States*;² and to

² *Dalehite v. United States*, 346 U.S. 15 at 43-44 (1953).

"As to the alleged failure in fighting the fire, we think this too without the Act. The Act did not create new causes of action where none existed before.

"* * * the liability assumed by the Government here is that created by "all the circumstances," not that which a few of the circumstances might create. We find no parallel liability before, and we think no new one has been created by, this Act. Its effect is to waive immunity from recognized causes of action and was not to visit the Government with novel and unprecedented liabilities.' *Feres v. United States*, 340 U.S. 135, 142, 95 L.Ed. 152, 158, 71 S.Ct. 153.

"It did not change the normal rule that an alleged failure or carelessness of public firemen does not create private actionable rights. Our analysis of the question is determined by what was said in the *Feres* case. See 28 U.S.C. §§1346 and 2674.

"The Act, as was there stated, limited United States liability to 'the same manner and to the same extent as a private individual under like circumstances.' 28 U.S.C. §2674. Here, as there, there is no analogous liability; in fact, if anything is doctrinally sanctified in the law of torts it is the immunity of communities and other public bodies for injuries due to fighting fire. This case, then, is much stronger than *Feres*. We pointed out only one state decision which denied government liability for injuries incident to service to one in the state militia. That cities, by maintaining fire-fighting organizations, assume no liability for personal injuries resulting from their lapses is much more securely entrenched. The Act, since it relates to claims to which there is no analogy in general tort law, did not adopt a different rule. See *Steitz v. Beacon*, 295 N.Y.

what extent has the *Dalehite* statement been limited by *Indian Towing Company, Inc., v. United States*?"

2. Is the United States liable under the Tort Claims Act under circumstances where a private person would be liable to claimant in accordance with the law of the State of Washington:

(a) Because of negligent failure to conform to standards set by Washington statutes relating to fire prevention and fire suppression on lands in forest areas;

(b) Under common law as a landowner, as a volunteer and as a contractor with a third party for negligently failing to prevent and extinguish fire in forest areas?

3. Do Washington Statutes RCW §§76.04.370 and 76.04.450, Appendix B, *infra*, pp. 35-38, impose liability without fault and are they pertinent in determining Government negligence and liability for failing to conform thereto? The Court of Appeals decided the statutes do impose liability without fault and are not applicable to the Government, in conflict with the decision of the Fourth Circuit Court of Appeals in *United*

51, 64 N.E.2d 704, 163 A.L.R. 342 (1945). To impose liability for the alleged nonfeasance of the Coast Guard would be like holding the United States liable in tort for failure to impose a quarantine for, let us say, an outbreak of foot-and-mouth disease."

³ *Indian Towing Company, Inc., v. U. S.*, 350 U.S. 61 (1955) holds that:

(a) Municipal immunities do not apply to immunize the Government; (b) the Government may be liable for its negligence in performing even public or "uniquely governmental" functions; (c) government liability is not predicated on the presence or absence of *identical* private activity or on whether a private party is likely to be performing such activity; (d) when Government undertakes services, inducing reliance, it will be liable if it fails to perform prudently as a volunteer; and (e) the Government should not be immunized from liability by technical, legalistic obscurities premised on fortuitous circumstances.

States v. Praylow, 208 F.2d 291 (4th Cir., 1953), certiorari denied 347 U.S. 934 (1954).

4. Can the United States be liable for its negligence as a volunteer? The Court of Appeals decided not, in conflict with this Court's decision in *Indian Towing Company, Inc., v. United States*, 350 U.S. 61 (1955), and with the Fifth Circuit Court of Appeals' decision in *United States v. Lawter*, 219 F.2d 559 (5th Cir., 1955).

5. Has the Court of Appeals so construed the Amended Complaint as to do substantial justice, or has it so grossly misconstrued the Amended Complaint as to call for an exercise of this Court's power of supervision? Two important matters are involved: (a) An allegation that "defendant owned, had control of and free and unrestricted access to" lands, including the right-of-way thereon, was stated by the Court to mean that the defendant had only "a right to enter and inspect the right-of-way." (b) A fire which started August 6 burned continuously until after September 20. By August 11 it was contained and controlled in smoldering form within a 1600-acre area. The Court of Appeals said, "It was this recurrence of fire on the 1600-acre tract which was the sole proximate cause of the injury." Vital questions as to relationships and duties of the parties and of proximate cause hinge on the proper and fair construction of the complaint. A corollary question is whether negligence of Forest Service employees as a proximate cause of a fire is nullified as a proximate cause solely by the same employees donning firemen's hats and thereafter proceeding negligently in the immune status of "public firemen."

6. Depending upon the extent by which the "public fireman" doctrine pronounced in *Dalehite* has been limited by *Indian Towing*, primary or collateral questions include: (a) Is the "public fireman" pronouncement of *Dalehite obiter dictum*? (b) Is the "public fireman" immunity contrary to the Tort Claims Act? (c) If there is "public fireman" immunity, do not equally well-established exceptions to that immunity apply? (d) Does the "public fireman" doctrine immunize the Government in all fire fighting situations, and if not, is this not a case where the doctrine should not apply?

STATUTES INVOLVED

The case does not involve any constitutional provisions, treaties, ordinances or regulations.

All of the federal statutes involved are set forth verbatim in Appendix A, *infra*, pp. 19-23; all of the Washington statutes are set forth verbatim in Appendix B, *infra*, pp. 25-39.

The Federal Tort Claims Act, 28 U.S.C. §1346(b), gives district courts:

" * * * exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, * * * caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

Section 2674 makes the United States liable " * * * in the same manner and to the same extent as a private individual under like circumstances, * * * "

STATEMENT

Suit under the Tort Claims Act for damages occurring on and after September 20, 1951, from fire which started August 6 and burned continuously thereafter. Government's motion to dismiss the Amended Complaint for failure to state a claim on which relief can be granted was granted by District Court and affirmed by Court of Appeals.

The District Court's jurisdiction was conferred by 28 U.S.C. §1346(b) and §§2671 to 2680, Appendix A, *infra*, pp. 19-22, the negligent acts and omissions complained of having occurred and the damage having been sustained within the Western District of Washington, Northern Division.

On the Olympic Peninsula in Washington the Government owns timberlands, some of which are cutover, administered by the U. S. Forest Service for timber sales to private industry. Privately-owned timber is adjacent to and intermingled with Government lands (R. 4-6). Where the fire started, the railroad of Port Angeles Western Railroad (P.A.W.) crosses Government lands. The Government "owned, had control of and free and unrestricted access to" the right-of-way and adjoining lands (R. 11). The right-of-way was *not* one granted by the United States. The right-of-way and adjoining Government land contained much inflammable debris, etc., contrary to the Washington statutes, Appendix B, *infra*, pp. 25-39 (R. 6-9). Commonly, and for years prior to August 6, 1951, P.A.W. operated defective and fire hazardous railroad equipment which threw sparks, and no patrol speeder followed the trains, all contrary to Washington statutes.

Forest Service employees knew all of the foregoing, had the right and power to abate the fire hazardous conditions and practices on its lands, but did nothing about them (R. 11-13). On August 6, 1951, six spot fires caused by sparks from a passing train occurred on and in the vicinity of the right-of-way. Forest Service employees immediately assumed, took and exercised exclusive supervision, direction and control of the fighting and suppression of all fires here involved. Petitioner relied upon Forest Service employees to do so (R. 13-14). The fire was contained in 60 acres but later spread to 1600 acres of cutover land where it was contained and controlled by August 11 (R. 14-15). Extremely dry weather prevailed for months prior to August 6 and until after September 20. Dry winds and low humidity were forecast and occurred at all pertinent times. Valuable stands of green timber adjacent to the 1600-acre area were imperiled (R. 10, 18-21). The Forest Service maintained only a patrol of the area with but few men. It took no steps to seek out and extinguish the smoldering fire. Sufficient men, equipment, water, tools, supplies and roads to extinguish the fire were available and could and should have been employed in the exercise of due care at all stages of the fire, including the spot fire stage, the 60-acre stage and the 1600-acre stage. All the foregoing was known to the Forest Service employees but they negligently failed to use or employ the same (R. 16-22). Stumps and logging debris in the 1600-acre area, privately owned, burned in smoldering form from August 11 to September 20, when foreseeable and forecast winds blew sparks out of the area into adjacent standing timber, causing a

tremendous forest fire and the damage complained of (R. 24). No negligence is claimed after the September 20th breakaway. Negligence claimed includes permitting fire hazardous conditions and practices on Government lands before the fire, and failure to extinguish the spot fires, the fire at the 60-acre stage, and the smoldering fire on the 1600-acre area (R. 26-29). The Forest Service, in common with private operators, had Fire Suppression Plans by which all necessary men and equipment could be mobilized and put into action. Neither the Forest Service nor any private operator maintained or operated a fire-fighting organization as such. Each had some men and equipment available and knew where all necessary additional men and equipment could be immediately obtained (R. 16-18). In this particular area the Government had undertaken to supervise fire fighting activities (R. 6-7). Private companies are authorized to and sometimes do undertake to supervise like activities in private, Federal and state timbered areas. Fire prevention and fighting is but one of many duties of the Forest Service employees (R. 8-10).

The discretionary function exception of 28 U.S.C. §2680(a), Appendix A, *infra*, p. 21, is not involved and has never been urged in this suit as all acts and omissions complained of were at the operational level.

REASONS FOR GRANTING WRIT

1. *Indian Towing Company, Inc., v. United States*, 350 U.S. 61 (1955), is almost irreconcilable with the "public fireman" doctrine stated in *Dalehite v. United States*, 346 U.S. 15 (1953). *Indian Towing* renounces the "public" or "uniquely governmental" character of an act as being determinative or even material in testing tort liability of the United States. Yet *Dalehite* speaks of the immunity from liability for negligence of public firemen. *Indian Towing* renounces the applicability of municipal corporation law in determining Federal tort liability. We find no case where immunity for acts of firemen is granted except in suits against municipal corporations. On the other hand, municipalities have been held liable in fire cases;⁴ the immunities of municipal corporations do not extend to private fire fighting companies and associations;⁵ and individuals have been held liable for not properly fighting fires originating on or spreading from their property.⁶

2. The decision of the Ninth Circuit Court of Appeals in this case is in direct conflict with the decisions of this Court and of the Courts of Appeal of other Circuits:

⁴*City of Denver v. Porter*, 126 Fed. 288 (8th Cir., 1903); *State v. City of Marshfield*, 122 Ore. 323, 259 Pac. 201 (1927); *Osborn v. City of Whittier*, 103 Cal.App.2d 609, 230 P.2d 132 (1951).

⁵*Voltz v. Orange Volunteer Fire Association*, 118 Conn. 307, 172 Atl. 220 (1934); *Doherty v. Oakland Beach Volunteer Fire Co.*, 70 R.I. 446, 40 A.2d 737 (1944).

⁶*Sandberg v. Cavanaugh Timber Co.*, 95 Wash. 556, 164 Pac. 200 (1917); *Jordan v. Spokane, Portland & Seattle R. Co.*, 109 Wash. 476, 186 Pac. 875 (1920); to the same effect is *McCann v. Chicago, Milwaukee & Puget Sound Railway Company*, 91 Wash. 626, 158 Pac. 243 (1916); *Lehman v. Maryott & Spencer Logging Co.*, 108 Wash. 319, 184 Pac. 323 (1919).

With respect to the Government's liability as a volunteer. The Ninth Circuit said, Appendix D, *infra*, p. 59, 225 F.2d 646:

“ * * * In our opinion the Dalehite case compels the conclusion that the Government, when intervening in the prevention and control of forest fires, may not be said to assume the common law obligation of a volunteer.”

That the Government may be liable for its negligence as a volunteer has been decided by this Court in *Indian Towing Company, Inc., v. United States*, 350 U.S. 61 (1955) and by the Fifth Circuit Court of Appeals in *United States v. Lawter*, 219 F.2d 559 (5th Cir., 1955), which involved rescue at sea by Coast Guard helicopter.

With respect to liability imposed by state statutes. The Ninth Circuit says that RCW §§76.04.370 and 76.04.450, Rem. Rev. Stat. §§5807 and 5818, Appendix B, pp. 36-38, “ * * * purport to impose liability on a private land owner for failing to take steps to remedy substandard conditions on his property * * * [and] impose liability without fault. * * * ” The Court then says that the *Dalehite* case does not waive immunity of the United States in such actions. That decision is in conflict with *United States v. Praylou*, 208 F.2d 291 (4th Cir., 1953), certiorari denied 347 U.S. 934 (1954), which holds the Government liable under the Tort Claims Act by reason of a South Carolina statute imposing absolute liability for injuries caused by aircraft. Furthermore, the Washington Supreme Court construes RCW §76.04.370 as not imposing absolute liability without fault. *State of Washington v. Canyon*

Lumber Corporation, 46 Wn.2d 701, 284 P.2d 316 (1955). Regardless of whether a state statute imposes liability which is absolute or not, it is important to settle the question whether state statutes, even criminal statutes, establishing standards of care, failure to conform to which may be negligence for an individual,⁷ are not also pertinent in testing for due care by Government employees.

3. The Federal Government owns a substantial majority of the timber and timber lands in the Pacific Northwest and a large part of the remainder of the nation's timber. Many of its holdings are adjacent to or checkerboarded with private timber and timber lands. The Forest Service and private timber operators operate in much the same fashion. Their respective employees have many and similar duties, only one of which is to be alert for fire and to act appropriately when fire occurs. Neither the Forest Service nor any private operator maintains or operates a fire department or fire-fighting organization as such, but both have

⁷ *Discargar v. City of Seattle*, 25 Wn.2d 306, 171 P.2d 205 (1946); *Cook v. Seidenberg*, 36 Wn.2d 256, 217 P.2d 799 (1950); *Erickson v. Kongali*, 40 Wn.2d 79, 240 P.2d 1209 (1952); *Spokane International Railway Co. v. United States*, 72 F.2d 440, 442 (9th Cir., 1934). Civil liability for forest fire damage repeatedly has been predicated on defendant's violation of the minimum standards of conduct prescribed by Washington fire prevention and suppression statutes. *Kuehn v. Dix*, 42 Wash. 532, 85 Pac. 43 (1906); *Jordan v. Welsh*, 61 Wash. 569, 112 Pac. 656 (1911); *Galbraith v. Wheeler-Osgood Co.*, 123 Wash. 229, 212 Pac. 174 (1923); *Wood & Iverson, Inc., v. Northwest Lumber Co.*, 138 Wash. 203, 244 Pac. 712 (1926); *Walters v. Mason County Logging Co.*, 139 Wash. 265, 246 Pac. 749 (1926); *Mensik v. Cascade Timber Co.*, 144 Wash. 528, 258 Pac. 323 (1927); *Conrad v. Cascade Timber Co.*, 166 Wash. 369, 7 P.2d 19 (1932). *Michigan Millers Mutual Fire Insurance Company v. Oregon-Washington Railroad and Navigation Company*, 32 Wn.2d 256, 201 P.2d 207 (1948). See also foreign cases digested in 42 A.L.R. 817, 111 A.L.R. 1148-50, 18 A.L.R. 2d 1095-98.

some men and equipment available to fight fires, and know where additional men and equipment can readily and quickly be obtained. Both have fire suppression plans designed to mobilize and put into action all necessary forces to combat the common enemy of fire. Fire burns with the same devastation whether it starts on one side of a section line or the other. Private owners must conform to standards set by State statutes designed to minimize risk of fire and requiring prompt and diligent action to extinguish fire on their lands, whether originating thereon or not. Those statutes are for the common good of private and public timber alike. The common law also imposes standards of care and conduct, failure to conform to which is negligence. If, as the Court of Appeals held, Forest Service employees are public firemen and the Government is immune from liability for their negligence, then the Government, private timber owners, timber industries and the nation as a whole are hopelessly confronted with real and substantial risk of loss of a major, but limited natural resource. It is fair comment that immunity from liability has a deteriorating effect on personal conduct and can lead to lax performance and token observance of practices necessary to the protection and perpetuation of our forests, both public and private. Why, by every legal, political, economic, social and just standard of this country, should a private citizen in the timber industry be liable for his negligence in preventing or fighting fires, and the Government, whose employees have the same opportunities for doing a good, bad or indifferent job as do employees of private owners, be immune from liability? The question

of Government responsibility for maintaining its timber and lands in proper condition and for acting appropriately and with due care in case of fire is extremely important and significant, and the answer to the question is unsettled and confused.

4. The Complaint must be construed in a light most favorable to plaintiff with all doubts resolved in plaintiff's favor and all allegations accepted as true.⁸ Rules of Civil Procedure, Rule 8 (f), requires that all pleadings shall be so construed as to do substantial justice. In Washington special responsibilities attach to ownership and control of land. Obviously the extent of the Government's ownership and its right of control of and responsibility for conditions on the land where the fire started, including the right-of-way over which the defective railroad equipment was operated, are matters of primary importance. If one owning or having control of the land has a right and duty to abate fire-hazardous conditions and practices thereon and to fight and pursue fire originating thereon, it is essential to determine the fact of ownership and control. In spite of the above-mentioned rules of construction of the Complaint and in spite of the clear allegation (R. 11) that the Government "owned, had control of and free and unresricted access to" the land, including the right-of-way thereon, where fire-hazardous conditions and practices existed and where the fire started, the Court of Appeals justifies its decision in part by stating that the Government had only "a right to enter and in-

⁸*Meredith v. John Deere Plow Co. of Moline*, 89 F.Supp. 787 (S.D. Iowa 1950); affirmed 185 F.2d 481 (8th Cir. 1950); certiorari denied 341 U.S. 936.

spect the right-of-way," Appendix D, *infra*, p. 60; 225 F.2d 646; and, as to other portions of the Government land, that the Washington statutes prescribing standards for conditions of and practices on lands in forest areas are not applicable to the United States because such statutes impose liability without fault, Appendix D, *infra*, pp. 62-63; 225 F.2d 646-648. Proceeding from those erroneous premises and misconstruing the Government's status as well as its responsibilities, the court holds that such negligence as occurred before the fire and such negligence as occurred after the fire up to the time it was contained on August 11 in the 1,600-acre area, is not of a character for which the Government can be held liable. En route to that conclusion, the court acknowledges, Appendix D, *infra*, p. 61; 225 F.2d 647, that there is a division of authority as to whether one failing to conform the use of his land to that of adjoining lands is negligent and then adopts, as controlling, a line of cases in direct conflict with the applicable Washington case of *Stephens v. Mutual Lumber Co.*, 103 Wash. 1, 173 Pac. 1031 (1918). In other words the Court of Appeals concludes that so far as the Government is concerned nothing that existed or occurred prior to August 11 is material and cannot be a proximate cause of the damage. That conclusion is possible only through gross misconstruction of the Complaint and erroneous interpretation of the law. According to the Court below, granting that a private party under like circumstances could be held negligent and liable, the acts and omissions, though negligent, having been those of Forest Service employees are superseded as a proximate cause by the intervening act

of those same Forest Service employees putting on their fireman's hats and thereafter proceeding negligently in their immune status as public firemen. Those ratiocinations are not compatible with the rules established by this and other courts that the Complaint be construed in the light most favorable to plaintiff and so as to do substantial justice. We believe it appropriate for this court to exercise its power of supervision.

5. The circumstances under and the extent to which immunity attaches to the acts of federal employees as public firemen is unsettled by *Dalehite v. United States*. For example, when is a federal employee a public fireman? Does it matter that fire prevention and fighting are but two of his many duties? Forest Service employees carry out forestry practices, sell timber, supervise road construction and logging operations, check on hunters, fishermen, campers, and recreationists, give information to the public, watch for fire and fire hazards, and act when fire occurs (R. 8, 9). Is the custodian of a Government building a fireman simply because his duties include good housekeeping and normal attention to fire danger when it occurs? Municipal fire departments devote their full time to the job and they are maintained to protect any and all property and any and all persons within the municipality. On the other hand, duties of Forest Service employees all relate to the administration of Government timber alone and not to the property of others. In administering and protecting Government timber, Forest Service employees best accomplish that purpose by cooperating with other timber operators in rendering and receiving reciprocal aid and by taking action for the mutual and common bene-

fit. It is as conservator of Government property that the Forest Service undertakes to fight fire on lands other than its own. This is contemplated and authorized by 16 U.S.C. §565, Appendix A, *infra*, p. 22. Were it not the Forest Service which undertook to supervise fire fighting in this area, it might have been State forestry employees who did so or it might have been Rayonier Incorporated, the petitioner herein, or some other private timber owner, or some association of private timber owners. Such arrangements are authorized by the above statute and by the Washington statutes, RCW 76.04.410 and 76.04.050, Appendix B, *infra*, pp. 38-39. Private parties sometimes do perform those functions in the states of Washington and Oregon.

Does the immediacy and urgency in one situation and the lack of it in another justify different treatment of fire-fighting cases? In the *Dalehite* case, as in many fire cases, there were acutely dangerous and explosive conditions in the face of a roaring fire. In the case at bar there was no such critical and emergent situation. The fire was contained and controlled within a 1,600-acre area of cutover land where it smoldered for forty days from August 11 to September 20. Within that time the smoldering fire could have been completely extinguished had the Forest Service used sufficient men, equipment and water, all of which were available. Instead, and in spite of the large and valuable timber stands imperiled by the smoldering fire and in spite of dry and fire-hazardous weather conditions, the Forest Service simply put the 1,600-acre area on a patrol basis with but few men to watch it and had no men present

during the night. That was wanton and negligent indifference to a potentially dangerous situation, the consequences of which were foreseeable. It might well be said that the Forest Service employees were not acting as firemen during that forty-day period because they did nothing of consequence to extinguish the fire. Is such conduct the act of a public fireman and is it the type of conduct from which the Government should be immune from liability? Had it been Rayonier or any other private party acting instead of Forest Service employees, as might have been the case, and had it been Government timber which was destroyed by the fire which ensued, would Rayonier have been liable to the Government?

If this court holds that the common law or Washington statutes setting standards for prevention and suppression of fire on lands in forest areas are properly used to determine whether the Forest Service employees were negligent, is the Government immune from liability for such negligence simply because, after the fire breaks out on Government lands, the Forest Service employees don their firemen's hats?

The answers to these and similar questions are important to the public welfare and as guides to conduct of Federal employees. Those questions have not been settled but can be decided in this case and are compelling reasons for this court to review the decision of the Court of Appeals.

CONCLUSION

We respectfully urge that this Petition for Certiorari be granted.

We also call attention to the Petition for Certiorari being filed in this court in the companion case, *Arnhold et al. v. United States et al.*, 225 F.2d 649.

Respectfully submitted,

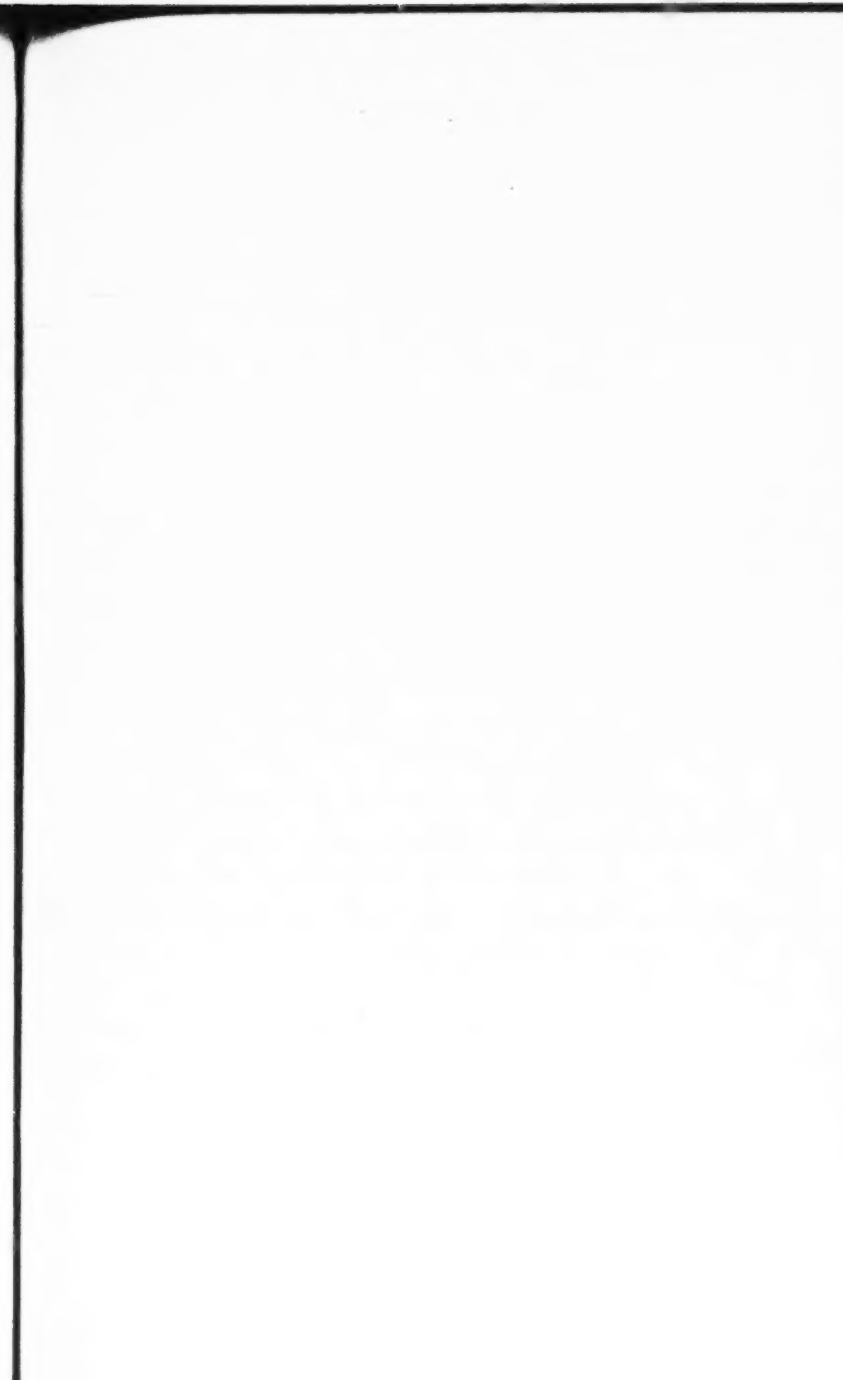
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APPENDIX A**FEDERAL STATUTES INVOLVED****Federal Tort Claims Act****28 U.S.C. §1346****§1346. *United States as Defendant***

“(a) * * *

“(1) * * *

“(2) * * *

“(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

“(c) * * *

“(d) * * *

“(1) * * *

“(2) * * *

“June 25, 1948, c. 646, 62 Stat. 933, amended Apr. 25, 1949, c. 92, §2(a), 63 Stat. 62; May 24, 1949, c. 139, §80 (a, b), 63 Stat. 101.”

28 U.S.C. §2671**“§2671. *Definitions***

“As used in this chapter and sections 1346 (b) and 2401 (b) of this title, the term—

“ ‘Federal agency’ includes the executive departments and independent establishment of the United States, and corporations primarily acting as, instrumentalities or agencies of the United States but does not include any contractor with the United States.

“ ‘Employee of the government’ includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

“ ‘Acting within the scope of his office or employment’, in the case of a member of the military or naval forces of the United States, means acting in line of duty. June 25, 1948, c. 646, 62 Stat. 982, amended May 24, 1949, c. 139, §124, 63 Stat. 106.”

28 U.S.C. §2674**“§2674. *Liability of United States***

“The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

“ * * * June 25, 1948, c. 646, 62 Stat. 983.”

28 U.S.C. §2680

“§2680. *Exceptions*

“The provisions of this chapter and section 1346(b) of this title shall not apply to—

“(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

“(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

“(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

“(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

“(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

“(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

“(g) Repealed. Sept. 26, 1950, c. 1049, §13(5), 64 Stat. 1043.

“(h) Any claim arising out of assault, battery, false

imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

“(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

“(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

“(k) Any claim arising in a foreign country.

“(l) Any claim arising from the activities of the Tennessee Valley Authority.

“(m) Any claim arising from the activities of the Panama Canal Company. As amended Sept. 26, 1950, c. 1049, §§2(a)(2), 13(5), 64 Stat. 1038, 1043.”

**Statute Authorizing Cooperative Forest Protection
Contracts**

16 U.S.C. §565

“§565. Cooperation by Secretary of Agriculture with State officials in protection of timbered and forest-producing lands from fire; limitation on amount of expenditures by United States

“If the Secretary of Agriculture shall find that the system and practice of forest-fire prevention and suppression provided by any State substantially promotes the objects described in section 564 of this title, he is hereby authorized and directed, under such conditions as he may determine to be fair and equitable in each State, to cooperate with appropriate officials of each

State, and through them with private and other agencies therein, in the protection of timbered and forest-producing lands from fire. In no case other than for preliminary investigation shall the amount expended by the Federal Government in any State during any fiscal year, under this section, exceed the amount expended by the State for the same purpose during the same fiscal year, including the expenditures of forest owners or operators which are required by State law or which are made in pursuance of the forest-protection system of the State under State supervision, and the Secretary of Agriculture is authorized to make expenditures on the certificate of the State forester, the State director of extension, or similar State official having charge of the cooperative work for the State, that State and private expenditures as provided for in this section have been made. In the cooperation extended to the several States due consideration shall be given to the protection of watersheds of navigable streams, but such cooperation may, in the discretion of the Secretary of Agriculture, be extended to any timbered or forest-producing lands or watersheds from which water is secured for domestic use or irrigation within the cooperative States. As amended July 25, 1947, c. 327, §1, 61 Stat. 449."

APPENDIX B

WASHINGTON STATUTES INVOLVED

Laws of 1869, p. 154, §601; Rem. Rev. Stat. §950; RCW 4.08.110:

“An action at law may be maintained by any county, incorporated town, school district or other public corporation of like character in this state, in its corporate name, and upon a cause of action accruing to it, in its corporate character and not otherwise, in any of the following cases:

(1) Upon a contract made with such public corporation;

(2) Upon a liability prescribed by law in favor of such public corporation;

(3) To recover a penalty or forfeiture given to such public corporation;

(4) To recover damages for an injury to the corporate rights or property of such public corporation.”

(This statute subsequently was amended by Laws of 1953, Ch. 118, §1.)

Laws of 1869, p. 154, §602; Rem. Rev. Stat. §951; RCW 4.08.120:

“An action may be maintained against a county or other of the public corporations mentioned or described in preceding section, either upon a contract made by such county or other public corporation in its corporate character and within the scope of its authority, or for an injury to the rights of the plaintiff arising from some act or omission of such county or other public corporation.” (This statute subsequently was amended by Laws of 1953, Ch. 118, §2.)

**Laws of 1909, Ch. 249, §271; Rem. Rev. Stat. §2523;
RCW 76.04.220:**

“§271. *Negligent Fires.*

“Every person who shall wilfully or negligently set, or fail to carefully guard or extinguish any fire, whether on his own land or the land of another, whereby the timber or property of another shall be endangered, or who shall fail to respond to any lawful summons to aid in guarding or extinguishing any fire, shall be guilty of a misdemeanor.”

**Laws of 1877, p. 300, §3; Rem. Rev. Stat. §5647;
RCW 4.24.040:**

“If any person shall for any lawful purpose kindle a fire upon his own land he shall do it at such time and in such manner and shall take such care of it to prevent it from spreading and doing damage to other persons property as a prudent and careful man would do, and if he fail so to do he shall be liable in an action on the case to any person suffering damage thereby to the full amount of such damage.”

**Laws of 1877, p. 300, §5; Rem. Rev. Stat. §5648;
RCW 4.24.050:**

“Persons engaged in driving lumber upon any waters or streams of this Territory, may kindle fires when necessary for the purposes in which they are engaged, but shall be bound to use the utmost caution to prevent the same from spreading and doing damage; and if they fail so to do, they shall be subject to all liabilities and penalties of this act, in the same manner as if the privilege granted by this action had not been allowed.”

Laws of 1877, p. 301, §6; Rem. Rev. Stat. §5649; RCW 4.24.060:

“The common law right to an action for damages done by fires, is not taken away or diminished by this act, but it may be pursued, notwithstanding the fines or penalties set forth in the first and second sections of this act; but any person availing himself of the provisions of the third section [shall] be barred of his action at common law for the damages so sued for, and no action shall be brought at common law for kindling fires in the manner described in the fifth section; but if any such fires shall spread and do damage, the person who kindled the same and any person present and concerned in driving such lumber, by whose act or neglect such fire is suffered to spread and do damage shall be liable in an action on the case for the amount of damages thereby sustained.”

Laws of 1951, Ch. 58, §4; Am. Rem. Supp. 1941, §5794 (part); RCW 76.04.250:

“§4. It shall be unlawful for anyone to operate within one-eighth mile of any forest land between the fifteenth day of April and the fifteenth day of October, which period shall be designated as the closed season unless the designated season is extended by the supervisor due to dangerous fire conditions:

“(1) Any woods operation or mill using spark-emitting or electric engines unless provided with the following fire tools, or the serviceable equivalent thereof, at each landing, and/or yarding tree or mill:

“(a) For operations employing more than five men:

"To be kept in a sealed tool box: Three axes, six shovels and six adze hoes;

"To be kept adjacent to the tool box: Two bucking saws with handles, and one five-gallon pump can filled with water.

"(b) For operations employing five men or less:

"To be kept in a sealed tool box: Two axes, three shovels, and three adze hoes;

"To be kept adjacent to the tool box: One bucking saw with handles, one hundred gallons of water and two buckets.

"(2) Any gasoline, diesel, or electric yarding, skidding, or loading engine unless:

"(a) Equipped with two chemical fire extinguishers of not less than one and one-half quart capacity;

"(b) Exhaust is turned up perpendicular and is clear of all obstructions or is equipped with an adequate spark arrestor.

"(3) Any tractor unless:

"(a) Equipped with one chemical fire extinguisher of not less than one quart capacity;

"(b) It has exhaust turned up perpendicular or is equipped with an adequate spark arrestor.

"(4) Any truck hauling forest products from any forest area unless:

"(a) Equipped with a chemical fire extinguisher of at least one quart capacity;

"(b) Equipped with one axe;

"(c) Equipped with one shovel;

“(d) Exhaust is turned up perpendicular or equipped with adequate spark arrestor or muffler.

“(5) Any portable power saw unless the power saw operators keep in their immediate possession, a chemical fire extinguisher of at least eight ounce capacity, or a serviceable shovel.

“(6) Any gasoline or diesel engine used in a mill or for uses not specifically mentioned above unless:

“(a) Equipped with chemical fire extinguisher of at least one quart capacity;

“(b) Exhaust is pointed up perpendicular and is clear of all obstructions or is equipped with an adequate spark arrester;

“(c) One hundred gallons of water and two buckets.”

Laws of 1951, Ch. 58, §5; Am. Rem. Supp. 1941, §5794 (part); RCW 76.04.260:

“§5. It shall be unlawful for anyone to operate within one-eighth mile of any forest land between the fifteenth day of April and the fifteenth day of October, which period shall be designated as the closed season unless the designated season is extended by the supervisor due to dangerous fire conditions:

“(1) Any spark-emitting railroad logging locomotive unless:

“(a) Equipped with a safe and suitable device for arresting sparks;

“(b) Equipped with a suitable power pump with a capacity of not less than twenty gallons per minute at pressures not less than forty pounds per square inch;

“(c) Equipped with three hundred feet of hose not less than one inch in diameter equipped with a standard nozzle;

“(d) Equipped with all the complement of hand tools listed under section 1(a) of section 76.04.250, kept in a sealed tool box on such locomotive ready for instant use;

“(e) Equipped with a sprinkler system which can be capable of wetting the tracks and at least two feet on either side of each rail. Such sprinkler system shall be manually controlled from the cab. The water supply tank for such sprinkler shall be capable of carrying an adequate supply of water in direct relation to the mileage of track covered and the available water supply;

“(f) During the closed season it is followed by a speeder or other patrol. Such patrol shall be equipped with two shovels, one axe, and one five-gallon pump can filled with water. When a logging train operates on a common carrier track the patrol will be regulated under laws pertaining to common carrier railroads.

“(2) Any common carrier railroad trains operating through forest lands unless:

“(a) Such trains are followed by a speeder patrol at such times and in such places as the supervisor may designate, each patrol to be equipped with a five gallon fire extinguisher, two shovels and one axe. In case a railroad company fails to provide patrol as required, the supervisor is hereby authorized to employ patrolmen for such purpose and the railroad company concerned shall be liable for the expense of the same to be

collected in a civil suit brought by the state against said railroad company;

“(b) At the request of the supervisor, such common carrier maintain pumping equipment and fire fighting tools specified by the supervisor but not to exceed those required of logging locomotives.

“(3) Any steam logging engine or boiler unless:

“(a) Being equipped with and using a safe and suitable device for arresting sparks;

“(b) Equipped with a suitable power pump with a capacity of not less than twenty gallons per minute at pressures of not less than forty pounds per square inch;

“(c) Equipped with three hundred feet of hose not less than one inch in diameter equipped with a standard nozzle.

“(4) Any railroad locomotive, logging locomotive, logging or other engine or boiler unless equipped with an adequate device to prevent the escape of fire or live coals or other burning substance from all ash pans, and all fire boxes, except when ash pans or fire boxes are being cleaned when not in motion. Any donkey boiler, when equipped to operate without the use of exhaust steam within the stack, and without any artificial means of creating a forced draught, shall not require a spark arrestor.”

Laws of 1951, Ch. 58, §6; Am. Rem. Supp. 1941, §5794 (part); RCW 76.04.270:

“§6. Every person violating the provisions of sections 76.04.250 and 76.04.260 shall upon conviction be

punished by a fine of not less than twenty-five dollars nor more than seventy-five dollars and the judgment of the court, in case of conviction, shall prohibit such person from operating a train, railroad locomotive, logging locomotive, or other engine, power equipment or boiler until the requirements of such sections have been complied with."

**Laws of 1911, Ch. 125, §15; Rem. Rev. Stat. §5795;
RCW 76.04.280:**

"No one operating a railroad shall permit to be deposited by his, or its, employees, and no one shall deposit during the closed season, fire or live coals upon the right-of-way outside of the yard limits, and within one-quarter of one mile of any forest material, without such deposit of fire or live coals shall be immediately extinguished.

"Any one violating the provisions of this section respecting the deposit of fire or live coals, shall upon conviction pay a fine of not less than twenty-five dollars (\$25.00), nor more than one hundred dollars (\$100.00) or be imprisoned in the county jail not exceeding thirty (30) days.

"Wardens and rangers shall report any lack of sufficient spark-arresters, and any lack of adequate devices for preventing the escape of fire and live coals, as provided in this act, to the forester, and to the prosecuting attorney of their county, and the superior court of that county where suit is first instituted, shall have jurisdiction of the offense."

**Laws of 1923, Ch. 184, §7; Rem. Rev. Stat. §5795-1;
RCW 76.04.290:**

“Railroad companies and other public carriers, or any person or persons, operating through forested districts, must report forthwith by telephone or telegraph any fires on or adjacent to their right-of-way or route, to the local fire warden or to the office of the state supervisor of forestry.”

**Laws of 1917, Ch. 33, §3; Rem. Rev. Stat. §5796;
RCW 76.04.310:**

“Everyone clearing right-of-way for railroad, public highway, private road, ditch, dike, pipe or wire line, or for any other transmission, or transportation utility right-of-way, shall pile and burn on such right-of-way all refuse timber, brush and debris cut thereon, as rapidly as the clearing or cutting progresses, or at such other times as the forester, or his authorized representatives may specify, and if during the closed season, in compliance with the law requiring burning permits. No one clearing any land or right-of-way, or in cutting or logging timber for any purpose, shall fell, or permit to be felled, any trees so that they may fall on to land owned by another, without first obtaining permission from such owner in addition to complying with the terms of this section for the disposal of refuse. All the terms of this section and other forest laws of the state shall be observed in all clearings of right-of-way or other land on behalf of the state itself or any county thereof, either directly or by contract; and unless unavoidable emergency prevents, provision shall be made by all officials directing such work for withholding a

sufficient portion of the payment therefor, until the piling and burning is completed, to insure the completion of the piling and burning in compliance with the provisions of this section.”

**Laws of 1923, Ch. 184, §9; Rem. Rev. Stat. §5803;
RCW 76.04.340:**

“Any person or persons who shall wilfully and deliberately set fire to any forest within the state, or in any place from which fire may be communicated to any such forest, or who shall accidentally set fire to any such forest, or to any place from which fire may be communicated to any such forest, and shall not extinguish the same or use every effort to that end, or who shall build any fire for lawful purposes or otherwise in or near any such forest, and through carelessness or neglect shall permit said fire to extend to and burn through such forest, shall be deemed guilty of a misdemeanor, and on conviction before a court of competent jurisdiction shall be punishable by fine not exceeding one thousand dollars (\$1,000.00) or imprisonment not exceeding one year, or by both such fine and imprisonment.”

**Laws of 1941, Ch. 168, §2; Rem. Supp. 1941, §5804;
RCW 76.04.350:**

“Every owner of forest land in the State of Washington shall furnish or provide therefor, during the season of the year when there is danger of forest fires, adequate protection against the spread of fire thereon or therefrom which shall meet with the approval of the State Forest Board: *Provided*, That for the purposes

of this section forest lands, lying in counties east of the summit of the Cascade mountains, shall be deemed to be adequately protected where patrol is furnished by the United States forest service of a standard and efficiency and seasonal duration, deemed by the State Forest Board to be sufficient for the proper protection of the forest land of such counties."

Laws of 1951, Ch. 58, §9; Am. Rem. Supp. 1945, §5806; RCW 76.04.380:

"Any fire on any forest land burning uncontrolled and without proper action being taken to prevent its spread, notwithstanding the origin of such fire, is a public nuisance by reason of its menace to life and property. The owner, operator, or person in possession of land, on which a fire exists, or from which it may have spread, notwithstanding the origin or subsequent spread thereof on his own or other lands, shall make every reasonable effort to control and extinguish such fire immediately after receiving written notice to do so from the supervisor, or a warden or ranger; and if such owner, operator, or person in possession refuses, neglects, or fails to do so, the supervisor or any fire warden or forest ranger shall summarily abate the nuisance thus constituted by controlling or extinguishing the fire and the cost thereof may be recovered from such owner, operator, or person in possession and if the work is performed on the property of the offender, shall also constitute a lien upon the property or chattels under his ownership. Such lien may be filed by the supervisor in the office of the county auditor and foreclosed in the manner provided by law for the fore-

closure of mechanics' liens. The prosecuting attorney shall bring the action to recover the cost or foreclose the lien, upon the request of the supervisor.

"The payment of forest patrol assessment on the land shall be interpreted as a reasonable effort in suppressing and extinguishing any fire on the land except when the fire started on that land as a result of owner/operator negligence and except when extra debris is present as described under laws pertaining to slash responsibility.

"When a fire occurs in a logging operation it shall be fought to the full limit of available employees, and such fire fighting shall be continued with the necessary crews in such numbers as are, in the opinion of the supervisor or his authorized deputies, sufficient to bring the fire to a patrol basis, and the fire shall not be left without a fire fighting crew or fire patrol until authority so to do has been granted in writing by the supervisor, or his authorized deputies."

Laws of 1951, Ch. 235, §1; Am. Rem. Supp. §5807; RCW 76.04.370:

"Any land in the state covered wholly or in part by inflammable debris created by logging or other forest operations, land clearing, or right-of-way clearing and which by reason of such condition is likely to further the spread of fire and thereby endanger life or property, shall constitute a fire hazard, and the owner thereof and the person responsible for its existence shall abate such hazard. If the state shall incur any expense from fire fighting made necessary by reason of such hazard, it may recover the cost thereof from the per-

son responsible for the existence of such hazard or the owner of the land upon which such hazard existed, and the state shall have a lien upon the land therefor enforceable in the same manner and with the same effect as a mechanic's lien. Nothing in this section shall apply to land for which a certificate of clearance has been issued.

“If the owner or person responsible for such hazard refuses, neglects, or fails to abate the hazard, the supervisor may summarily cause it to be abated and the cost thereof may be recovered from the owner or person responsible therefor, and shall also be a lien upon the land enforceable in the same manner with the same effect as a mechanic's lien. The summary action may be taken only after twenty days' notice in writing has been given to the owner or reputed owner of the land on which the hazard exists either by personal service or by registered letter addressed to him at his last known place of residence.”

**Laws of 1917, Ch. 105, §5; Rem. Rev. Stat. §5808;
RCW 76.04.400:**

“When any responsible protective agency or agencies composed of timber owners other than the state shall agree to undertake systematic forest protection in co-operation therewith and such co-operation shall appear more advantageous to the state than the maintenance of the independent system provided elsewhere by law, the state forester may, with the approval of the state board of forest commissioners, designate suitable areas to be official co-operative districts and substitute thereto whenever necessary, in place of the

county wardens elsewhere provided by law, such district wardens, with such district headquarters and duties, as may be agreed upon by him and by the co-operating agencies to render such co-operation most effective. He may also co-operate in the compensation of such wardens, or in the payment of other expenses for the prevention and control of fire in such official fire districts, to such extent as the board of forest commissioners may deem equitable on behalf of the state, and claim for such payments shall be approved and paid in the manner prescribed for claims outside such co-operative districts."

Laws of 1949, Ch. 141, §1; Rem. Supp. 1949 §5817-1; RCW 76.04.410:

"The State Supervisor of Forestry shall, subject to the approval of the Director of the Department of Conservation and Development, have power, subject to the provisions hereof, to enter into contracts and undertakings with private corporations or rural fire protection districts for the protection and development of the forests or any designated forest area within the state."

Laws of 1921, Ch. 67, §1; Rem. Rev. Stat. §5818; RCW 76.04.450:

"All forests and timber upon all lands in the State of Washington, lying west of a line one mile west of the eastern boundary of range ten west of the Willamette Meridian and north of the north boundary line of Grays Harbor county, shall be protected and preserved from the fire hazard to which they are or may

be exposed by reason of the unusual quantity of fallen timber upon such lands. It shall therefore be unlawful for any person, firm, company or corporation, their officers, agents or employees, to do or commit any act which shall expose any of the forests or timber upon such lands to the hazard of fire."

[All of the land described in paragraph XI of the Amended Complaint (R. 11) is located within the area described in the foregoing statute.]

Laws of 1911, Ch. 125, §4, part; Rem. Rev. Stat. §5784, part; RCW 76.04.050, part:

"The supervisor, subject to the approval of the director, may appoint trained forest assistants, possessing technical qualifications, and may employ necessary clerical assistants, and fix the amount of their salaries, which shall be payable monthly.

"He shall, under the supervision of the director, whenever he deems it necessary to the best interests of the state, co-operate in forest surveys, forest studies, forest products studies, forest fire fighting and patrol, and the preparation of plans for the protection, management, replacement of trees, wood lots, and timber tracts, with other states, the United States, the Dominion of Canada, or any province thereof, and with counties, cities, corporations, and individuals within this state. * * * "

* * * "

" * * * ."

APPENDIX C

**TRANSCRIPT OF DISTRICT COURT'S ORAL
REMARKS****Transcript of District Court's Oral Remarks on
January 18, 1954**

In the above-entitled and numbered cause, given on the 18th day of January, 1954, by the Honorable George H. Boldt, United States District Judge, at Seattle, Washington.

* * * * *

(Whereupon, arguments having been had by counsel upon motion of Defendant to dismiss, the following proceedings were had, to-wit:)[3*]

The Court: This matter presents a question that is certainly far free from doubt, at least in my mind.

My general impressions at this time about it are that in the absence of the Dalehite case I would overrule the motion, but the opinion in the Dalehite case gives me grave doubt as to whether or not this claim is within the Federal Tort Liability Act.

Unfortunately, the language of the majority opinion in the Dalehite case in so far as it bears on our problem, is in itself not free from doubt. The difficulty I have is in determining whether or not Floe was acting as a public fireman. If in all of the matters referred to in the complaint he was acting as a public fireman, according to Dalehite there is no action because Justice

*Page numbering appearing at foot of page of original Reporter's Transcript of Record.

Reed says in the majority opinion after referring to the Act and a quotation from the Feres case says:

“It——”

namely the Act,

“——did not change the normal rule that an alleged failure or carelessness of public firemen does not create private actionable rights.”

Query: Under the allegations of this pleading was Floe acting as a public fireman?

It is clear he was acting as a fireman because [4] everything that is alleged in the complaint is to the effect that he was directly engaged in the matter of fighting fire. So he must have been a fireman no matter how poor a fireman or inadequate a fireman or negligent a fireman, he was clearly a fireman.

Now, that leaves the only question; was he a public fireman under this language of the Dalehite case? And I do not intend to engage in a philosophical debate with the Supreme Court. It is my obligation under the oath that I have taken, to apply the law as laid down by the Supreme Court, even though I might have thought otherwise if it had been presented to me as a matter of first impression.

All right. Does that not narrow the question down then to the question of whether or not Floe was a public, acting in a public capacity as a fireman?

You put the question that way and it sounds like a rhetorical question. He certainly wasn't acting on his, in his independent capacity. That is alleged with great particularity in the complaint that he was acting in a public capacity, that he was acting as a representative of the United States Forest Service.

He was a fireman and it is very clear that he was a public fireman, no matter how inadequate or negligent or careless in his job, and Justice Reed says in the majority opinion: [5]

“It——”

namely the Federal Tort Liability Act,

“——did not change the normal rule that an alleged failure or carelessness of public firemen does not create private actionable rights.”

He goes on to say:

“There is no analogous liability; in fact, if anything is doctrinally sanctified in the law of torts it is the immunity of communities and other public bodies for injuries due to fighting fire.”

Now, it is true in that paragraph he was talking about whether or not a cause of action, tort cause of action, of the character referred to existed prior to the adoption of the Act, but still the language that is used is very, very unequivocal and very sweeping. The last sentence of that same paragraph he says:

“To impose liability for the alleged nonfeasance of the Coast Guard would be like holding the United States liable in tort for failure to impose a quarantine for, let us say, an outbreak of foot-and-mouth disease.”

Is it an unfair thing to say, to paraphrase that language [6] and say:

“To impose liability for the alleged nonfeasance of the Coast Guard would be like holding the United States liable in tort for failure of the Forest Service in fighting a forest fire”?

If you say the one thing, it seems to me you'd surely say the other.

Personally I would prefer to decide the issue after having heard all of the evidence when I might perhaps more adequately judge the nature, extent, character of the capacity of the Forest Service with respect of fighting fire, and yet it seems to me that it would expedite the disposition of this matter if all concerned, both Government and plaintiffs, plaintiff, have a ruling from higher authority than mine on this basic question which, if decided adversely to the plaintiff, disposes of the case. If not so decided, then there would be very extensive proceedings required in order to determine whether in fact Floe was negligent, and if so, whether his negligent acts caused the damage complained of and the nature and extent of the damage.

Gentlemen, I am of the opinion that I am obliged under the Dalehite case, particularly the portions of it that I have referred to and which, incidentally, I have [7] studied and restudied long before today, to sustain the motion to dismiss, basing it entirely on the Dalehite case.

That will be the order of the Court.

Mr. Marion: Your Honor, would it be an imposition to ask you, for the purpose of the record, to state your position on the duties of the Government as a land-owner; on whose land the fire originated due to an accumulation of debris; whether or not using a fire department or any other means is controlling of that issue?

The Court: My general impression, if you want that; is that what you——

Mr. Marion: I think quite apart from the Dalehite case.

The Court: My general impression is that on that phase of the case I would not sustain this motion to dismiss, myself on that phase of the case. I—if the Government does not have immunity by virtue of its capacity as a public fireman, my opinion is there is a duty, there would be a duty to exercise reasonable care in confining, controlling and extinguishing fire and consequently I would be of the opinion that the action might be maintained, but for the public capacity of the Forest Service in the matter of fighting fire.

Does that give you what you have in mind, or——

Mr. Marion: May I confer with my [8] “betters,” your Honor?

(Whereupon, Mr. Marion conferred with co-counsel.)

Mr. Marion (Continuing): As I understand your Honor, your Honor holds that in taking part in the forest fire fighting activities Mr. Ranger Floe and his subordinates were operating a public fire department or public firemen?

The Court: No, that isn't what I said. I said they were acting as public firemen.

Mr. Marion: And——

The Court: I don't know whether they had a whole department or a regiment or a squad or single individuals, but I think under the language in the Dalehite case if a Government employee is acting in the capacity of a public fireman, whether he be as an individual or

whether he be as a troop or a squad or a regiment or what, under that decision there is no liability under the Act.

Mr. Marion: And that applies even though the fire originated on lands owned by the Government for pecuniary gain and profit and due to a condition, an accumulation of inflammable material which, under the statutes of the State, are a nuisance?

The Court: You are going beyond what I think, what I understood your question to call for.

Mr. Marion: I am trying, your Honor, to narrow [9] this down so that we may know precisely the question to be decided.

The complaint alleges, of course, a condition which is a nuisance under the laws of the State of Washington in that there were accumulations of debris and so forth. This condition existed on the lands owned by and subject to control of the Government. Now your Honor's ruling is that because the Forest Service employees were what you termed "public firemen"—

The Court: What Justice Reed termed as "public firemen."

Mr. Marion: —these other factors are superseded by and do not influence your decision.

The Court: That is right. If I have been—I have been seriously thinking during the last hour or two of the advisability of taking the matter under advisement and writing a written opinion—a temptation which has occurred to me before and up to now I have successfully resisted. I was getting very close to yielding to

that temptation on this occasion, but finally concluded that I believe that it is to the best interests of all concerned that we speed on with the disposition of it, and my—I can only give you my honest, best judgment about it as I see it, and that is what it is, and I think that if you have a mind to do so, you can review that order very cheaply, inexpensively, and I [10] hope expeditiously, and if I am wrong, be back in a reasonably short time for a trial of the case on its merits.

* * * * *

TRANSCRIPT OF PROCEEDINGS

Transcript of District Court's Oral Remarks on February 27, 1955

Before: HONORABLE GEORGE H. BOLDT,
United States District Judge.

The Court: We will proceed to consider the motions in Arnhold and Rayonier vs. United States.

Mr. Cushman: Your Honor, I wish permission to continue orally the motion in the Rayonier case against the amended complaint and an amended complaint has also been filed in the Arnhold case in the last day or two and I didn't have time to get out a new motion for judgment on the pleadings against that complaint and—— [4]

* * *

The Court: I see. Very well, are you ready then to proceed? Do you want to proceed, Mr. Marion?

Mr. Marion: Yes, your Honor. I wonder if I might,

*Page numbering appearing at foot of page of original Reporter's Transcript of Record.

for the purposes of the record, ask Mr. Cushman to state his motion orally, reading from his prior motion but substituting the word "amended complaint" instead——

The Court: I think that would be a good thing to do. Do that Mr. Cushman. Then we will have——

Mr. Marion: There were two grounds, that is why I wanted to have it clear.

Mr. Cushman: (Reading.)

"The Defendant herein moves the Court as follows:

"1. To dismiss the action because the plaintiff fails to state a claim against the defendant."

The Court: You wanted to read "amended complaint." [6]

Mr. Cushman: I beg pardon. (Reading.)

"The Defendant herein moves the Court as follows:

"1. To dismiss the action because the amended complaint fails to state a claim against the defendant upon which relief can be granted.

"2. To dismiss the action on the ground that the Court lacks jurisdiction over the subject matter in the action."

The Court: Very well. That motion will be allowed and will be——

* * * * *

The Court: This is the second very able and thoughtful argument that has been presented to me to sustain the right of action contended for by the plaintiffs in these two cases. I have been very impressed by the argument and I will merely say of the argument this morn-

ing, that the doubt that I expressed at the commencement of my remarks on January 17th [sic] may be somewhat deepened, but not to the point where I feel it requires a change in the ruling. [14]

Extended comment, I think, is not necessary, but perhaps just a word or two to indicate my thought. I am well aware of the important factual differences between the Dalehite case and the present case and between the Eighth Circuit National Manufacturing Company case and in fact all of the other cases that have been cited with the instant case. Nothing has been cited that is closely similar to our situation here in my opinion on the facts. And I will readily agree with Mr. Ferguson and repeat here what I said before, namely, that unfortunately the language of the majority opinion in the Dalehite case in so far as it bears on our problem is in itself not free from doubt, to put it at a minimum. Nevertheless, after giving this matter a very great deal of thought, I am satisfied that the basic philosophy supporting the majority decision in the Dalehite case, and a little more fully expressed in the Eighth Circuit case, requires, if followed, a granting of the motions to dismiss in the present case.

I should say that of course I did not undertake on January 17th at the conclusion of the previous argument to state all of the considerations that I had in mind, and I recognized then and I recognize now that the particular thing that I commented on at that time might have seemed to be a rather shallow analysis of the Dalehite opinion as it related to our present case. I am not going to attempt to elaborate [15] further on it now because in the last analysis I am satisfied the decision

will not be predicated on what I think or say about it if the case is reviewed. I merely meant in all fairness to indicate that I had that thought in mind.

I will say just one further thing. In view of the vastness of the public domain and the tremendous properties owned by the Federal Government, state governments as well, I feel that whether logical or not, there is a distinction, or it will be held that there is a distinction which is perhaps more literally correct statement of it, between the situation of real property owned by the Government and real property owned by an individual.

If we take the literal language of the Federal Tort Claims Act, it is very hard to justify on any logical basis that there is any distinction. I grant you that, but I am satisfied that public consideration, the serious implications that would flow from a failure to make such a distinction will dictate that such a distinction be drawn. If so, of course there, as far as I know, never has been any right of action against the state authorized by Washington law or any other state law as far as I know for negligence in the keeping of publicly-owned land, and I have an idea that that is the analogy that will be laid as a test for this situation rather than the strict analogy of a purely private individual owning forest lands in the State of [16] Washington.

But whether or no that ultimately be the case, in my own mind I feel obliged to grant the motions on the strength of the philosophy of the Dalehite decision, and that is what the ruling of the Court will be.

* * * * *

The Court: Yes. While you are reviewing, may I ask

one other thing, you might want to talk about that as well. In a case of this magnitude and importance, not only to the litigants, but generally to law, I would have much preferred taking the case under advisement and taking time to write and polish up an opinion, which perhaps is what I should have done anyway, but in order to expedite this disposition of the case, I ruled on January 17th [sic] orally and here again I have done likewise. Yet it seems to me desirable, that for whatever it is worth, my views ought to be made a part of any record that may be taken on appeal. I presume you have in mind doing that?

Mr. Marion: Yes.

(Whereupon, counsel conferred.) [23]

* * *

Mr. Marion: One other matter. In the [24] Rayonier case—I think it would also be true in the Arnhold case—the defendant's motion to dismiss was based on two grounds: one, no claim was stated, the other, the Court lacks jurisdiction. Do I assume that your Honor denies the motion on the ground that the Court lacks jurisdiction?

The Court: That is right.

Mr. Marion: That is the basis on which we have prepared this order.

* * *

(Whereupon, discussion was had concerning the entering of the order.)

Mr. Marion: For the purpose of the record, I also wish to state that Rayonier Inc. does not wish to amend further and will stand on its amended complaint.

The Court: Very well. The order appears to me to [25] be in proper form. Do you have any objection to the form of the order now, Mr. Cushman?

Mr. Cushman: Well, your Honor, I don't believe that the first ground is well taken. I believe the Court should deny this motion because the Court lacks jurisdiction since the matter does not come within the Tort Claims Act, and that is it.

The Court: The point hasn't been presented to me at all in the argument.

Mr. Cushman: Pardon?

The Court: I didn't understand that the point had been presented to me in the argument at all. Perhaps inferentially it was, but I didn't so understand it.

Mr. Cushman: Perhaps I am confused, your Honor.

The Court: Maybe it is another way of saying the same thing.

Mr. Cushman: Our original motion had two grounds.

The Court: Oh, yes, of course, but I understood that the ground—that you were receding from the first ground but that the ground that was being urged was the old traditional “not sufficient facts to constitute a ground for relief.”

Mr. Marion: Your Honor, if you have no jurisdiction I don't believe your Honor could rule on the other ground.

The Court: I wouldn't think so too. That is [26] my impression. I think the order is in proper form. I am going to enter the order as now presented. It is signed, the Clerk is directed to enter it.

* * * * *

APPENDIX D

OPINION OF COURT OF APPEALS**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

RAYONIER INCORPORATED, a Corporation, *Appellant,*
vs.

UNITED STATES OF AMERICA, *Appellee.*

No. 14,329, September 1, 1955

**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION**

Before: BONE, ORR and HASTIE, Circuit Judges.
ORR, Circuit Judge.

Appellant filed an original and amended complaint in the trial court seeking to recover damages against the United States. The amended complaint, says appellant, alleges a cause of action within the area in which the United States has waived its sovereign immunity from suit under the Federal Tort Claims Act, 28 U.S.C.A. §§1346, 2671-2680. The damages claimed are for property losses.

On motion the trial court dismissed the action on the ground that the complaint failed to state a claim against the United States on which relief can be granted.

We summarize the pertinent allegations of the amended complaint. Appellee, hereafter Government, is and was at all material times the owner of vast timber forests situate on the Olympic Peninsula of the State of Washington. These forests are administered and pa-

trolled by the Forest Service, a branch of the Department of Agriculture. The Port Angeles Western Railroad is the owner of various railroads rights of way across the public lands, which rights of way are subject to a right of "control" and "free access" held by the United States. Appellant, hereafter Rayonier, is a Delaware corporation with extensive timberland holdings in the State of Washington, principally on the Olympic Peninsula.

On August 6, 1951, sparks emitted by a passing locomotive ignited a fire along the railroad's right of way. The Chief United States Forest Ranger was immediately notified and assumed control of the fire fighting activities, which control he continued to exercise during the entire period of fire fighting. The fire spread first to sixty acres of public land, where it was confined until August 7th. It then flared up and spread to a 1600-acre tract, not alleged to be government owned. By August 11th the fire was "contained and controlled." It smouldered in the 1600-acre tract until September 20th. On September 20th it flared up again, escaped from the 1600-acre area and caused the alleged injuries to Rayonier's land.

It is further alleged that the Chief Forest Ranger committed numerous wrongful acts and omissions in the course of fighting the fire on the 1600-acre tract. The amended complaint avers that he failed to employ sufficient men and equipment although there was an ample supply available, and that the proper utilization of such available man power and material would have resulted in the extinguishment of the fire.

In addition, Rayonier seeks to predicate liability on the Government's alleged negligent failure to maintain the roadbed of the railroad in safe condition, its failure to maintain adjoining public lands in safe condition, its failure to perform the fire fighting duties required of a landowner, and its failure to fight the fire according to the duty of care which the law requires of a volunteer.

The crux of our inquiry is whether the allegations of the amended complaint brings the case within the ambit of the Tort Claims Act. The trial court in deciding that they do not relied upon the holding in the case of *Dalehite v. United States*, (1953) 346 U.S. 15. While much is alleged as to the origin of the fire, negligence of the United States in failing to keep the railroad right of way clear of inflammable matter as well as negligence in failing to control the early spread of the fire, we read the amended complaint in its entirety as picturing a situation wherein the operation occurring after the fire had spread to the 1600-acre plot is determinative of the liability of the Government, if any. The fire, after reaching the 1600-acre tract, smouldered for more than a month, flared up again and reached appellant's property. In our opinion it was this recurrence of fire on the 1600-acre tract which was the sole proximate cause of the injury to appellant's property and that risks, if any, created by the act or omissions of agencies of the Government prior to the containment of the fire in the 1600-acre area had terminated.¹ Here the complaint al-

¹"In general, when a third person becomes aware of the danger, and is in a position to deal with it, the defendant will be free to assume that he would act reasonably." Prosser, *Torts*, 1941, 367; *Cook v. Seidenverg*, 1950, 36 Wash.2d 256, 217 P.2d 799; see, *Crowley v. City of Raymond*, 1939, 198 Wash. 432, 88 P.2d 858; *Lehman v. Maryott &*

leges that the fire was "contained and controlled." It is alleged that men, equipment and water, for more than a month, were available to extinguish it. Failure to extinguish the fire is alleged to be due to the negligent refusal to employ the available resources and to use ordinary judgment. Paragraph XXXII of the complaint states that:

"The fire and all burning material within the 1600-acre area and especially in the westerly portion of said area and in the landing described in paragraph XXI above could have been completely extinguished between the dates of August 11 and September 19, 1951 and the fire which broke loose on September 20, 1951, could have been avoided, by the use and employment of more men, tools, equipment, water and supplies, and such men, tools, equipment, water and supplies were available and could have been so used and employed by the District Ranger Floe and his subordinates."

On these facts, liability may not be predicated on conduct occurring before the spread of the fire to the 1600-acre tract.

Having reached the conclusion that failure to completely extinguish the fire after it had been contained within the 1600-acre tract for approximately six weeks was the sole proximate cause of the injuries to appellant's property, we now give attention to the allegation that the failure to completely extinguish and contain the fire within said tract was due to the negligence of the fire fighters. These men were Forest Service em-

Spencer Logging Company, 1919, 108 Wash. 319, 184 P. 323. Cf. Pittsburgh Reduction Co. v. Horton, 1908, 87 Ark. 576, 113 S.W. 647, and Ryan v. New York Central R.R. Co., 1866, 35 N.Y. 210, 91 Am. Dec. 49.

ployees and functioning as public firemen. Under the circumstances was their employment such as to render the Government liable in the same manner and to the same extent as a private individual would be and thus within the provision of the Tort Claims Act, 28 U.S.C.A. §2674?

In the Dalehite case, *supra*, the Supreme Court construed the act with reference to an analogous fact situation. There suit was brought to recover damages for negligence on the part of government officials in the manufacture and shipment of ammonium nitrate fertilizer. The fertilizer exploded while stored aboard ship in the harbor of Texas City, Texas. The Coast Guard attempted to put out the fire but failed. It was charged with taking inadequate measures to control the blaze. The Supreme Court denied relief. We set forth a portion of the opinion of the Supreme Court:

"As to the alleged failure in fighting the fire, we think this too without the Act. The Act did not create new causes of action where none existed before.

"... the liability assumed by the Government here is that created by "all the circumstances," not that which a few of the circumstances might create. We find no parallel liability before, and we think no new one has been created by, this Act. Its effect is to waive immunity from recognized causes of action and was not to visit the Government with novel and unprecedented liabilities." *Feres v. United States*, 340 U.S. 135, 142.

"It did not change the normal rule that an alleged failure or carelessness of public firemen does not create private actionable rights. Our analysis of the question

is determined by what was said in the *Feres* case. See 28 U.S.C. §§1346 and 2674. The Act, as was there stated, limited United States liability to 'the same manner and to the same extent as a private individual under like circumstances.' 28 U.S.C. §2674. Here, as there, there is no analogous liability; in fact, if anything is doctrinally sanctified in the law of torts it is the immunity of communities and other public bodies for injuries due to fighting fire. This case, then, is much stronger than *Feres*. We pointed out only one state decision which denied government liability for injuries incident to service to one in the state militia. That cities, by maintaining fire-fighting organizations, assume no liability for personal injuries resulting from their lapses is much more securely entrenched. The Act, since it relates to claims to which there is no analogy in general tort law, did not adopt a different rule. See *Steitz v. City of Beacon*, 295 N.Y. 51, 64 N.E.2d 704. To impose liability for the alleged nonfeasance of the Coast Guard would be like holding the United States liable in tort for failure to impose a quarantine for, let us say, an outbreak of foot-and-mouth disease."

The control of conflagrations on forest lands is as much a public function as the fighting of shipboard fires or of pestilence in time of epidemics. We conclude that the Forest Rangers in fighting the fire acted in the capacity of public firemen. The Forest Service engages in extensive fire protection programs. It assists state foresters by subsidies and consultation; it conducts nationwide fire prevention campaigns; it carries on extensive research into techniques and devices for fire prevention and suppression. The service has entered into

several agreements similar to the one alleged to be in force here whereby it assumes the state function of suppressing fires on all lands within a particular area, whether publicly or privately owned. We see no distinction between non-liability of the United States for negligence of the Coast Guard in fighting fires and analogous negligent conduct by the Forest Service. In our opinion the Dalehite case compels the conclusion that the Government, when intervening in the prevention and control of forest fires, may not be said to assume the common law obligation of a volunteer.

We do not regard the fact that the United States had by prior agreement with the State of Washington undertaken to protect against forest fires as creating a distinction, rendering the Dalehite case inapplicable. In entering into the agreement, even if it be considered a binding contract (the complaint falls short of alleging a binding contract, and there is no allegation of consideration for the Government's promise) the Government did no more than undertake to perform services in a public capacity. Cf, *National Manufacturing Co. v. United States*, 8 Cir. 1954, 210 F.2d 263.

Having concluded that the alleged neglect of the firemen to use reasonable methods to control the fire within the 1600-acre tract was the proximate cause of the spread of the fire to appellant's lands, and that inasmuch as the fire fighters were acting as public servants to the extent that their activities were without the area of the waiver of sovereign immunity contained in the Tort Claims Act, we might well conclude this opinion. But Rayonier makes other claims which we proceed to discuss.

The principal allegations in this respect relate to the failure of the Government to keep the railroad right of way (the starting point of the fire) and adjoining public lands free and clear of inflammable material and, once the fire started, failure to take proper precautions to extinguish it before it reached the 1600-acre tract.

It is alleged that liability may be predicated on the Government's failure to maintain the Railroad's right of way in satisfactory condition. The right of way held by the Railroad was at least equivalent to an easement.² Ordinarily the servient estate is under no duty to make repairs, the duty resting on the dominant tenant who alone is liable for injury to third parties. The allegation in the complaint that the Government had a right to enter and inspect the right of way does not alter this. Reservation of such a right is not equivalent to an assumption of the obligation to repair and maintain the right of way. The servient tenant does not undertake to clean up such rubble as the Railroad may accumulate. Cases dealing with the law of landlord and tenant cited by the appellant are not persuasive, for example, see *Appel v. Muller*, 262 N.Y. 278, 186 N.E. 785.

The Government, under the allegations of the complaint, was an adjoining landowner to whose property

² *Great Northern Ry. Co. v. United States*, 1941, 315 U.S. 262; *Himonas v. Denver & R. G. W. R. Co.*, 10 Cir., 1949, 179 F.2d 171. See also, *Jones, Easements*, 1898, §208; *Tiffany, Real Property*, 3rd ed. 1939, §772, and cases cited.

³ *Reed v. Alleghany Co.*, 1938, 330 Pa. 300, 199 A. 187. See, also, *Herzog v. Grosso*, 1953, 41 Cal.2d 219, 259 P.2d 429; *Strauss v. Thompson*, 175 Kan. 98, 259 P.2d 145; 2 *Thompson, Real Property*, 1939, §680; 3 *Elliott, Railroads*, 1921, §1750; *Jones, Easements*, 1898, §§821, 831.

fire, ignited on the property of a third party, has spread. At common law an adjoining landowner is not liable to third parties for failure to anticipate negligent acts of his neighbor and maintain and utilize his lands accordingly. Rayonier has cited no cases where such a liability was imposed. Cases such as *Prince v. Chehalis Savings & Loan Association*, 1936, 186 Wash. 372, 58 P.2d 290, affirmed 186 Wash. 377, 61 P.2d 1374, cited by Rayonier deal with the liability of a landowner on whose property fire breaks out because of the existence of fire hazards and are distinguishable.

There is a division of authority on the question of whether failure to maintain safe conditions on adjoining land may constitute contributory negligence in a suit by such landowner to recover against the party responsible for the fire. In *Leroy Fibre Co. v. Chicago M. & St. P. Ry. Co.*, 1914, 232 U.S. 340, the United States Supreme Court held as a matter of law that plaintiff's stacking of inflammable flax near a railroad right of way did not constitute contributory negligence. This holding has been cited with approval and applied in recent cases.⁴ Other recent cases apply a different rule.⁵

In *Riley v. Standard Oil Co. of Indiana*, 1934, 214 Wis. 15, 252 N.W. 183, liability was imposed upon a person who neither started the fire nor owned the land on which it occurred. The court there accepted the

⁴See *Atlas Assurance Co., Ltd. v. State*, 102 Cal.App.2d 789, 229 P.2d 13; and *Kleinclaus v. Marin Realty Co.*, 94 Cal.App.2d 733, 211 P.2d 582.

⁵See *Stephens v. Mutual Lumber Co.*, 1918, 103 Wash. 1, 173 P. 1031, where failure on the part of the adjoining landowner to remove his property after notice of the outbreak of fire was held to bar his recovery, and *Nashville C. & St. L. R. v. Nants*, 1933, 167 Tenn. 1, 65 S.W.2d 189.

jury's determination that the defendant, who had stored grease and oil in a warehouse next to a wide field of uncut grass despite knowledge that for over a year a fire had smouldered in a peat bog a short distance away, was liable to a plaintiff whose house was set afire by burning particles from the defendant's warehouse. The defendant was held negligent for failure to cut the grass. That case is an extreme one. The point in question was assumed by the court without reference to authorities or arguments. The law has been traditionally reluctant to visit extensive liabilities on those directly responsible for the occurrence of fire. See *Ryan v. N.Y. Central R.R. Co.*, 1866, 35 N.Y. 210. Cases dealing with contributory negligence are in conflict. In our opinion a failure to maintain safe conditions on property adjoining a railroad right of way does not render one liable for damages because the fire spread across his land to other land.

Appellant cites R.C.W. §§76.04.370 and 76.04.450, and §§5807 and 5818 Rem. Rev. Stats.* These provisions purport to impose liability on a private landowner for

*Rem. Rev. Stats. § 5807, and § 5818:

"§ 5807. Cut-over lands as public nuisance—Abatement—Cost as lien—Notice before suit—Excepted lands. Any land in the State of Washington covered wholly or in part by inflammable debris created by logging or other forest operations, land clearing, and/or right of way clearing and which by reason of such condition is likely to further the spread of fire and thereby endanger life or property, shall constitute a fire hazard, and the owner or owners thereof and the person, firm or corporation responsible for its existence are required to abate such hazard. Nothing in this section shall apply to lands for which a certificate of clearance, under section 2 of chapter 207, Laws of 1929 (section 5792-1 of Remington's Revised Statutes; section 2569-1 Pierce's Code), has been issued.

"If the owner or person, firm or corporation responsible for the existence of any such hazard shall refuse, neglect or fail to abate such hazard, the state supervisor of forestry may summarily cause it to be abated and

failing to take steps to remedy substandard conditions on his property but have no application here. Secs. 5807 and 5818 impose liability without fault. No defense based on the reasonableness of the conduct proscribed is provided. The *Dalehite* case, 346 U.S. at pages 44, 45, holds that the Federal Tort Claims Act does not waive the immunity of the United States in such actions.⁷

In the instant case the amended complaint predicates

the cost thereof and of any patrol or fire fighting made necessary by such hazard may be recovered from said person, firm or corporation responsible therefor or from the owner of the land on which such hazard existed by an action for debt and said costs shall also be a lien upon said land and may be enforced in the same manner, with the same effect and by the same agencies as the lien provided for in section 3 of chapter 105, Laws of 1917 (section 5806 of Remington's Revised Statutes; section 2581 of Pierce's Code): Provided, That said summary action hereinbefore referred to may be taken only after twenty (20) days' notice in writing has been given to the owner or reputed owner of the land on which the hazard exists either by personal service on said owner or by registered letter addressed to said owner at his last known place of residence."

"§ 5818. Forests and timber protected. All forests and timber upon all lands in the state of Washington, lying west of a line one mile west of the eastern boundary of range ten west of the Willamette Meridian and north of the north boundary lines of Grays Harbor county, shall be protected and preserved from the fire hazard to which they are or may be exposed by reason of the unusual quantity of fallen timber upon such lands. It shall therefore be unlawful for any person, firm, company or corporation, their officers, agents or employees, to do or commit any act which shall expose any of the forests or timber upon such lands to the hazard of fire."

⁷"... there is yet to be disposed of some slight residue of theory of absolute liability without fault. This is reflected both in the District Court's finding that the FGAN constituted a nuisance, and in the contention of petitioners here. We agree with the six judges of the Court of Appeals, 197 F.2d 771, 776, 781, 786, that the Act does not extend to such situations, though, of course well known in tort law generally. It is to be invoked only on a 'negligent or wrongful act or omission' of an employee. Absolute liability, of course arises irrespective of how the tortfeasor conducts himself; it is imposed automatically when any damages are sustained as a result of the decision to engage in the dangerous activity. The degree of care used in performing the activity is irrelevant to the application of that doctrine. But the statute requires a negligent act. So it is our judgment that liability does not arise by virtue either of United States ownership of an 'inherently dangerous commodity' or property or of engaging in an 'extra-hazardous' activity. *United States v. Hull*, 1 Cir., 195 F.2d 64, 67."

liability on the failure by the Government to take adequate steps to control the fire when it had spread to public lands and before it reached the 1600-acre tract. We fail to find a case wherein a landowner was held liable to third parties for failure to fight a fire spreading across his land from the land of another. Cases cited by appellant deal with the duties of a landowner on whose property the fire broke out. To hold an intermediate landowner liable for damage to property caused by fire passing over his land, to all parties subsequently damaged notwithstanding the efforts of public firemen to extinguish the fire, would be to impose a harsh rule.

Sec. 5806 Rem. Rev. Stat. of Washington,⁸ R.C.W. 76.04.380, does not change the common law so as to im-

⁸§ 5806, Rem. Rev. Stat. of Washington, R.C.W. 76.04.380:

"§ 5806. Uncontrolled fires as nuisances—Abatement and lien for cost. Any fire on any forest land in the State of Washington burning uncontrolled and without proper precaution being taken to prevent its spread is hereby declared a public nuisance by reason of its menace to life or property. Any person, firm or corporation responsible for either the starting or the existence of such fire is hereby required to control or extinguish it immediately, without awaiting instruction from a forest officer, and if said responsible person, firm or corporation shall refuse, neglect or fail to do so, the supervisor of forestry or any fire warden or forest ranger acting with his authority, may summarily abate the nuisance thus constituted by controlling or extinguishing the fire and the cost thereof may be recovered from said responsible person, firm or corporation by action for debt and, if the work is performed on the property of the offender, shall also constitute a lien upon said property. Such lien may be filed by the supervisor of forestry in the office of the county auditor and foreclosed in the manner provided by law for the foreclosure of liens for labor and material. It shall be the duty of the prosecuting attorney for the county to bring such action for debt, or to foreclose such lien, upon the request of the supervisor of forestry.

"When a fire occurs in a logging operation, such fire shall be fought to the full limit of available employees, as may be necessary, and such fire fighting shall be continued with the necessary crews in such numbers as are, in the opinion of the state forester, or his authorized deputies, sufficient to bring such fire to a patrol basis, and such fire shall not be left without such fire fighting crew or fire patrol until authority so to do has been granted in writing by the supervisor of forestry, or his authorized deputies."

pose such a liability. The duty it imposes becomes operative upon the receipt of a written demand. The penalty exacted is reimbursement to the state of expenses incurred by it in fire fighting activities. A method of securing reimbursement is provided. No liability is placed on the landowner, with or without written notice, to third parties where public fire fighters take inadequate measures in their attempt to subdue the blaze.

The judgment of dismissal is affirmed.

(Endorsed:) Opinion. Filed Sept. 1, 1955.

Paul P. O'Brien, Clerk.

APPENDIX E**THE SEPTEMBER 1, 1955, JUDGMENT
UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT**

RAYONIER INCORPORATED, a corporation,	} No. 14329
<i>Appellant,</i>	
vs.	
UNITED STATES OF AMERICA,	<i>Appellee.</i>

JUDGMENT

**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION**

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Western District of Washington, Northern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is affirmed.

(ENDORSED) Judgment

Filed and Entered: September 1, 1955

PAUL P. O'BRIEN, Clerk.

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 745

RAYONIER INCORPORATED, A CORPORATION,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The United States District Court for the Western District of Washington, Northern Division, rendered no opinion. The opinion of the United States Court of Appeals for the Ninth Circuit (Pet. App. 53-65) is reported at 225 F. 2d 642.

JURISDICTION

The judgment of the Court of Appeals was entered on September 1, 1955 (R. 90). A timely filed petition for rehearing *en banc* was denied on October 14, 1955 (R. 91). On December 27, 1955, leave was granted to file a second petition

for rehearing (Supp. R. 1). On January 10, 1956, the time for filing a petition for a writ of certiorari was extended by order of Mr. Justice Douglas to and including March 12, 1956. On February 17, 1956, the second petition for rehearing was denied (2nd Supp. R. 1). The petition for a writ of certiorari was filed on March 9, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether, under Washington law, the alleged presence of combustible matter at the point of origin of the forest fire was the proximate cause of the damage.

2. Whether, under Washington law, the owner of the servient estate in a railroad right of way is under a duty to keep the right of way free of combustible matter.

3. Whether the Federal Tort Claims Act extends to a claim grounded upon the allegedly negligent failure of the Forest Service properly to fight and extinguish a forest fire originating on a railroad right of way and spreading to neighboring private and public lands.

STATUTE INVOLVED

The relevant provisions of the Federal Tort Claims Act¹ are as follows:

¹ The Federal Tort Claims Act was enacted as Title IV of the Legislative Reorganization Act of 1946, 60 Stat. 842, 28 U. S. C. 921, *et seq.* While subsequently repealed,

28 U. S. C. 1346 (b).

Subject to the provisions of chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

* * * * *

28 U. S. C. 2674.

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

its provisions were reenacted into law, under the revision of the Judicial Code, as 28 U. S. C. 1291, 1346, 1402, 1504, 2110, 2402, 2411, 2412, 2671-2680, effective September 1, 1948 (62 Stat. 869, 992). Except for insignificant alterations in language, the portions of the Act relevant to the instant suit remained unchanged.

STATEMENT

This action was brought by petitioner under the Tort Claims Act to recover damages for property loss allegedly sustained as a result of a forest fire which originated on a railroad right of way running across a national forest and which, thereafter, spread to neighboring public and private lands. Both courts below held that petitioner's amended complaint failed to state a claim upon which relief could be granted. The allegations of the complaint, and the proceedings below, may be summarized as follows:

1. *Allegations of fact in the amended complaint.* Petitioner is a Delaware corporation authorized to do business in the State of Washington (R. 3-4). Its principal business is the manufacture of pulp and, in connection therewith, it owns extensive timber lands in the State of Washington as well as sundry facilities and equipment for use in logging operations (R. 4-5). Additionally, at the times relevant to this action, it was a party to two so-called "Timber Sales Contracts" with the Forest Service of the Department of Agriculture, under the terms of which it had the right and obligation to purchase and cut certain timber on public lands (R. 5). On September 20, 1951, there remained uncut timber which petitioner had the right and obligation to purchase under these contracts (R. 5).

The Olympic National Forest contains extensive timber lands, many of which are adjacent to or in the general vicinity of lands owned by petitioner (R. 5-6). These public lands are administered by the Forest Service and a portion of the timber thereon is sold to private parties for commercial and industrial purposes (R. 6).

By agreement between the Forest Service and the State of Washington, a "Forest Service Protective Area" was established, embracing *inter alia* petitioner's lands and the above-mentioned public domain (R. 6). The Forest Service agreed to protect the land within this area against fire and to take action in suppressing fires originating on or threatening the area (R. 6-7). Petitioner and other adjacent landowners were aware of the establishment of the Forest Service Protective Area and of the duties of the Forest Service pertaining thereto (R. 7).

The District Ranger of the Forest Service for the district in which this Forest Service Protective Area was located was Sanford Floe (R. 8). In the performance of their duties, Floe and his subordinates were supposed to inspect and patrol the lands within the Protective Area to discover, abate, and eliminate conditions which constituted fire hazards (R. 9). Further, when a fire occurred, they were supposed to supervise, direct, and control its suppression (R. 9). Floe was authorized to employ, rent, and use all men, equipment, tools, and materials he deemed neces-

sary to accomplish these ends (R. 9). Also, he and his subordinates were fire wardens of the State of Wahington and in such capacity had the authority to impress help in the prevention, suppression, and control of forest fires (R. 9-10).

It is further alleged that during 1951, and for several years prior thereto, the Port Angeles Western Railroad possessed a right of way across the public domain (R. 11). The locomotives and other equipment operated by the Railroad on the right of way were defective, with the result that they emitted sparks (R. 11). The Railroad had also permitted its right of way to become covered with inflammable matter and many of its track ties had rotted (R. 11-12). Additionally, such matter had accumulated on lands adjoining the right of way (R. 11-12). These conditions were, or should have been, known to Floe and could have been, but were not, abated by him prior to August 6, 1951 (R. 12). Floe had called to the Railroad's attention, however, its use of defective equipment and its failure to observe prescribed fire prevention practices (R. 12).

At approximately noon on August 6, 1951, sparks from a Port Angeles Western Railroad train crossing the public domain started fires on and in the vicinity of the right of way (R. 12). Shortly thereafter, Floe was notified of the fires, whereupon he and his subordinates immediately assumed exclusive supervision and control of the efforts to suppress them (R. 13). Petitioner

knew that this supervision had been undertaken and relied upon its being continued (R. 13-14).

Between August 7, and August 11, 1951, the fires spread over approximately 1,600 acres of land (R. 15). By the latter date, it was brought under control and thereafter remained contained within the 1,600 acre area until the morning of September 20, 1951 (R. 15). During this period, the fire and all burning material could have been completely extinguished had Floe employed available men and equipment (R. 25). On September 20, 1951, a northeasterly wind of not unusual force carried sparks and other burning matter from within the area to lands to the west and south (R. 24). New fires started and spread rapidly in various directions, destroying or damaging facilities and equipment on petitioner's property, as well as timber on the public domain which was covered by the Timber Sales Contracts entered into by petitioner and the Forest Service (R. 24, 31).

It is also alleged that the spread of the fire on September 20, as well as the resultant damage to petitioner's property, was attributable to the negligence of Floe and his subordinates in the conduct of their fire-fighting activities (R. 29). In broad outline, this negligence consisted of the failure at various stages to dispatch and utilize sufficient amounts of the men and equipment at their disposal; the failure to maintain proper fire patrols and look-outs; the failure to take appro-

priate action in the light of weather conditions and weather forecasts; the failure to discover and extinguish between August 11, 1951, and September 19, 1951, all fires and burning matter in the 1,600 acre area; and the failure to carry out a Fire Suppression Plan which previously had been adopted by the Supervisor of the Olympic National Forest (R. 13-19).

2. *Proceedings in the courts below.* On February 19, 1954, the amended complaint was filed (R. 3-35). On February 27, 1954, the United States made an oral motion to dismiss the complaint on the grounds that it failed to state a cause of action and that the District Court lacked jurisdiction over the subject matter (R. 48-49). After a hearing (R. 48-65), the District Court granted the motion on the former ground and, on March 1, 1954, an order was entered dismissing the cause with prejudice (R. 66-67).

The Court of Appeals affirmed. With respect to the alleged presence of combustibles on and along the right of way, the court held (1) that they were not the proximate cause of the damage complained of (Pet. App. 55-56), and (2) that, assuming the truth of petitioner's allegations, the Government was not guilty of actionable negligence (Pet. App. 60-65). With respect to the alleged negligence of the Forest Service in fighting the fire on the 1600 acre area, the court determined (1) that the Forest Service was acting in the capacity of a public fireman and (2) that,

as a consequence, the claim was barred by this Court's holding in *Dalehite v. United States*, 346 U. S. 15, 43-44 (Pet. App. 56-59).

ARGUMENT

By this action, petitioner seeks to impose liability upon the United States under the Tort Claims Act for the alleged damage to its property flowing from a fire which it concedes was set by an improperly operated locomotive on the Port Angeles Western Railroad's improperly maintained right of way across the national forest and which, as the complaint itself shows, was fought by the Forest Service in the capacity of a public fireman. Insofar as the claim is based upon the theory that the United States may be held responsible for the railroad's misconduct which occasioned the fire, the court below correctly determined that petitioner's claim fails on two independent local law grounds: (1) The events transpiring prior to the spread of the fire to the 1,600 acre area on August 11, 1951, were not the proximate cause of the damage to petitioner's land, and (2) the Government was under no duty to keep the right of way clear of combustibles or to guard against the railroad's negligence. To the extent that the action is based upon the alleged negligence of the Forest Service in fighting the fire on the 1,600 acre area, the court properly held that the claim was barred by this Court's decision in *Dalehite v. United*

States, 346 U. S. 15. Accordingly, there is no occasion for further review.

1. Petitioner strenuously contends (Pet. 13-15) that the court below erred in its construction of Washington law respecting the obligation of a landowner to maintain in good repair a railroad right of way running across his property. In addition, the petition seemingly takes issue (Pet. 13-14) with the court's determination that the railroad possessed a conventional easement with respect to the right of way.

While these assertions are without substance (see pp. 12-15), *infra*), even if such were not the case petitioner's position would hardly be improved. For the principal basis of the holding below that the allegations of pre-August 11 negligence failed to state a cause of action was that, reading the complaint in its entirety, this negligence was not the proximate cause of the damage. Pointing to the allegations (1) that between August 11 and September 20 (when it spread to petitioner's land) the fire was contained within the 1,600 acre area and (2) that, had the forest ranger Floe properly utilized the men, equipment, and water available for the purpose, the fire could have been completely extinguished during that period, the court observed (Pet. App. 55):

While much is alleged as to the origin of the fire, negligence of the United States in failing to keep the railroad right of way clear of inflammable matter as well as neg-

ligence in failing to control the early spread of the fire, we read the amended complaint in its entirety as picturing a situation wherein the operation occurring after the fire had spread to the 1,600-acre plot is determinative of the liability of the Government, if any. The fire, after reaching the 1,600-acre tract, smouldered for more than a month, flared up again and reached appellant's property. In our opinion it was this recurrence of fire on the 1,600-acre tract which was the sole proximate cause of the injury to appellant's property and that risks, if any, created by the act or omissions of agencies of the Government prior to the containment of the fire in the 1,600-acre area had terminated.

This view accords with generally accepted principles of proximate causation, fully applicable in the State of Washington. As the Supreme Court of that jurisdiction has held on numerous occasions, the proximate cause of a particular loss or injury is that "cause which, in a natural and continuous sequence, unbroken by any new, independent cause, produces [the damage], and without which that [damage] would not have occurred." *Burr v. Clark*, 30 Wash. 2d 149, 157, 190 P. 2d 769, 773. See also *Scobba v. City of Seattle*, 31 Wash. 2d 685, 198 P. 2d 805; *Viking Automatic Sprinkler Co. v. Pacific Indemnity Co.*, 19 Wash. 2d 294, 142 P. 2d 394; *Pierce v. Pacific Mutual Life Ins. Co.*, 7 Wash. 2d 151, 109

P. 2d 322; *Eckerson v. Ford's Prairie School District No. 11*, 3 Wash. 2d 475, 101 P. 2d 345. Cf. Prosser on *Torts* (1941), pp. 311, *et seq.*

2. While deeming its determination on proximate cause to be dispositive of the Government's liability for the purported presence of combustible material on and alongside of the railroad right of way, the Court of Appeals nevertheless went on to consider whether, in any circumstances, such liability would exist. In answering this question in the negative (Pet. App. 60-65), the court again looked primarily to local tort law principles. We submit that these principles were correctly applied.

Petitioner to the contrary notwithstanding, railroads enjoy an easement in their rights of way on public lands. Right of Way Act of March 3, 1875, 18 Stat. 482, 43 U. S. C. 934; *Great Northern Ry. Co. v. United States*, 315 U. S. 262; *Himonas v. Denver & R. G. W. R. Co.*, 179 F. 2d 171 (C. A. 10). And it is universally accepted that, absent a contract whereby it assumes the duty of so doing, the holder of the servient estate owes no common law obligation to make repairs, either to the dominant owner or to third parties. Instead, the duty to maintain the dominant estate and to insure that it remains in good condition devolves upon, and solely upon, the owner of the easement. See *e. g.*, *Reed v. Allegheny County*, 330 Pa. 300, 303, 199 Atl. 187; *Herzog v. Grosso*, 41 Cal. 2d 219, 259 P. 2d 429;

Strauss v. Thompson, 175 Kan. 98, 259 P. 2d 145; *City of Bellevue v. Daly*, 14 Idaho 545, 549, 94 Pac. 1036; *Hastings v. Chi., R. I. & P. Ry. Co.*, 148 Iowa 390, 126 N. W. 786; *Herman v. Roberts*, 119 N. Y. 37, 23 N. E. 442; 2 *American Law of Property*, § 8.66; Jones on *Easements* (1898) § 831. Thus, while Washington courts have continuously imposed liability on railroads for fires which originate in combustibles on their right of way and then spread to adjoining lands, even where there was no negligence in equipping and operating the locomotive (see *e. g.*, *Abrams v. Seattle & M. Ry. Co.*, 27 Wash. 507, 68 Pac. 78; *Fireman's Fund Inc. Co. v. Northern Pacific Ry. Co.*, 46 Wash. 635, 91 Pac. 13; *Slaton v. C., M. & St. P. Ry. Co.*, 97 Wash. 441, 166 Pac. 644), there has never been a suggestion that the servant owner could be equally held responsible.

Petitioner urges, however, that the Government was under a special statutory duty to maintain the right of way in good condition. In this connection, it points to Sections 5807 and 5818 of the Revised Statutes of the State of Washington (R. C. W. §§ 76.04.370, 76.04.450). The former Section provides that land covered by inflammable debris shall constitute a fire hazard and requires the owner and the person responsible for the existence of the hazard to abate it. Section 5818 declares it unlawful for any person to do or commit any act which shall expose the forest or

timber of the Olympic Peninsula to the hazard of fire.

Since it is not alleged that the Government committed any act upon the right of way which contributed to the purported fire hazard thereon, Section 5818 is by its terms inapplicable. And, insofar as Section 5807 is concerned, petitioner cannot point to a single judicial decision, either in Washington or elsewhere, which has construed the term "owner" in a statute of this character as encompassing the holding of the servient estate in an easement. The reason for this lack of support for petitioner's contention is clear. If so interpreted, the Section would have the effect of imposing criminal responsibility² upon the servient owner for statutory violations by the dominant owner even though, unlike a landlord-lessor, the former ordinarily has no duties with respect to the easement except the negative one of not interfering with the latter's use. See *e. g. Bina v. Bina*, 213 Iowa 432, 239 N. W. 68; *Harman v. Roberts*, 119 N. Y. 37, 23 N. E. 442; *Moffett v. Berlin Water Co.*, 81 N. H. 79, 121 Atl. 22; Jones on *Easements* (1898), § 831.

Were Section 5807 to be construed as rendering the owner of the servient estate subject to criminal and civil liability for the presence of fire hazards on the right of way—because of its lim-

² The violation of certain sections of title 36 of the Washington Revised Statutes, including Section 5807, constitutes a misdemeanor. See Section 5821 (R. C. W. § 76.04.480).

ited ownership alone and irrespective of who in fact created the hazard—that statute still could not be invoked here. The United States has consented to be sued under the Tort Act only for “the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment.” 28 U. S. C. 1346 (b), *supra*, p. 3. Thus, as this Court held in *Dalehite v. United States*, 346 U. S. 15, 44–45, the waiver of immunity does not extend to situations where the claim is grounded upon either a statute or common law doctrine which imposes absolute liability without fault.³

3. (a). The court below found that (Pet. App. 58), in fighting the fire on both public and private lands, the Forest Service was acting in the capac-

³ With respect to petitioner's allegation that there was combustible matter on the lands adjoining the right of way (R. 11–12), there are several complete answers. In the first place, the complaint does not allege, and petitioner has never suggested, that this alleged fire hazard was created by Government employees. Thus, once again, petitioner seeks to impose absolute liability upon the United States. Secondly, while the Washington courts have not been confronted squarely with the precise question, the California courts recently reiterated the long standing principle that a landowner is under no duty, in the use of his property, to guard against negligence by a railroad in the operation of its trains on an adjoining right of way. See *Atlas Assurance Co. Ltd. v. State*, 102 Cal. App. 2d 789, 229 P. 2d 13, 17, 19. Cf. *Kleinclaus v. Marin Realty Co.*, 94 Cal. App. 2d 733, 211 P. 2d 582, 583–584. We know of no holding in any jurisdiction to the contrary.

ity of a public fireman. This ruling has ample support both in Congressional enactments pertaining to the duties of the Service and in the allegations of petitioner's complaint.

By the Act of May 23, 1908, c. 192, 35 Stat. 259, 16 U. S. C. 553, the Forest Service was directed by Congress to aid in the enforcement of the laws of the states and territories with regard to the preventing and extinguishment of forest fires. Three years later, following a series of unprecedented forest fires which burned millions of acres in Minnesota, Idaho, Washington and Oregon, Congress decided to broaden the participation of the Service in fire fighting activities. By Section 2 of the Act of March 1, 1911, c. 186, 36 Stat. 961, 16 U. S. C. 563, the Secretary of Agriculture was authorized to enter into cooperative agreements with states for the organization and maintenance of a system of fire protection on any private or state forest lands situated upon the watershed of a navigable river. And, in 1924, the Secretary's authority was further extended to include cooperative fire protection activities in all the "timbered and forest-producing lands" in "each forest region of the United States." Act of June 7, 1924, c. 348, 43 Stat. 653, 16 U. S. C. 564, 565.

As a result of these statutory provisions, the Forest Service now cooperates with 43 states in providing fire protection on state and private

forest lands.⁴ This cooperation takes several forms.⁵ The Service has underwritten a substantial portion of the cost of needed equipment and training activities. It helps state foresters in the latter's direction of organized fire prevention and control. It conducts nationwide fire prevention campaigns. It does extensive research into techniques and devices that will assist states and private landowners in fire prevention and suppression.

Further, the Service has entered into several agreements assuming the function of undertaking the suppression of fires on *all* lands within a particular area, whether federally owned or not. As stated in petitioner's complaint itself (R. 6-7, 9-10), such an agreement was outstanding in the area involved here and by its terms the personnel of the Forest Service were clothed with the duties and privileges of state forest wardens, including the right to conscript and impress men and equipment for fire suppression. And it is to be noted that in Washington, as in other jurisdictions, these wardens have among their duties the control and suppression of forest fires throughout the forest area of the state.

⁴ Annual Report of the Secretary of Agriculture (1951), p. 18.

⁵ See *The Work of the U. S. Forest Service* (Department of Agriculture Information Bulletin No. 91 (1952)), pp. 12, 18; *The Budget of the United States for the fiscal year ending June 30, 1955*, p. 343.

See Rev. Code Wash. §§ 76.04.060, 76.04.070. In this capacity, they clearly perform the same functions in relation to the forest area as a municipal fire department performs in relation to the community it serves.

While the statistical data relating to Forest Service fire prevention and suppression activities, as above outlined, cannot tell the whole story, they do give a good picture of the present magnitude of those activities. During the fiscal year 1953, for example, the Service controlled 11,063 forest fires at a cost of more than 5 million dollars and spent approximately 9.5 million dollars in the execution of its cooperative fire protection agreements with state governments.*

(b). That the Tort Claims Act does not extend to a claim grounded upon the alleged failure of public firemen properly to extinguish a fire started by a railroad on its own right-of-way is clear from this Court's decision in *Dalehite v. United States*, *supra*. There, it was alleged, and the District Court found, that the Coast Guard had negligently performed its general public duty to fight the fire resulting from the explosion of fertilizer grade ammonium nitrate at Texas City. In reversing the District Court's ultimate determination of liability, the Fifth Circuit held that this purported negligence was not actionable.

* *Budget*, fn. 5, *supra*, pp. 338, 339, 343.

In re Texas City Disaster Litigation, 197 F. 2d 771, 780. This Court agreed (346 U. S. 43-44):

As to the alleged failure in fighting the fire, we think this too without the Act. The Act did not create new causes of action where none existed before.

“ . . . the liability assumed by the Government here is that created by ‘all the circumstances’, not that which a few of the circumstances might create. We find no parallel liability before, and we think no new one has been created by, this Act. Its effect is to waive immunity from recognized causes of action and was not to visit the Government with novel and unprecedented liabilities.’ *Feres v. United States*, 340 U. S. 135, 142.”

It did not change the normal rule that an alleged failure or carelessness of public firemen does not create private actionable rights. Our analysis of the question is determined by what was said in the Feres case. See 28 U. S. C. §§ 1346 and 2674. The Act, as was there stated, limited United States liability to “the same manner and to the same extent as a private individual under like circumstances.” 28 U. S. C. § 2674. Here, as there, there is no analogous liability; in fact, if anything is doctrinally sanctified in the law of torts it is the immunity of communities and other public bodies for injuries due to fighting fire. This case, then, is much stronger than Feres. We pointed out only one state

decision which denied government liability for injuries incident to service to one in the state militia. That cities, by maintaining fire-fighting organizations, assume no liability for personal injuries resulting from their lapses is much more securely entrenched. The Act, since it relates to claims to which there is no analogy in general tort law, did not adopt a different rule. See *Steitz v. City of Beacon*, 295 N. Y. 51 * * *. To impose liability for the alleged nonfeasance of the Coast Guard would be like holding the United States liable in tort for failure to impose a quarantine for, let us say, an outbreak of foot-and-mouth disease. [Emphasis added.]

The recent decision of the Court in *Indian Towing Co. v. United States*, 350 U. S. 61, did not disturb this holding.⁷ On the contrary, the majority, in determining that a claim grounded upon alleged negligence in the maintenance of a navigational aid was within the purview of the Tort Act, found *Dalehite* to be distinguishable (350 U. S. at 69):

The differences between this case and *Dalehite* need not be labored. The govern-

⁷ After the decision in *Indian Towing*, petitioner moved in the court below for leave to file a second petition for rehearing which squarely urged that *Indian Towing* had overruled the fire-fighting portion of the *Dalehite* opinion. The court below granted the motion "good cause therefor appearing," considered the new petition, and thereafter denied it.

ing factors in *Dalehite* sufficiently emerge from the opinion in that case.

In an accompanying footnote, the majority observed that in *Dalehite* the Court had:

disposed of a claim of liability for negligence in connection with fire fighting by finding that "there is no analogous liability . . ." in the law of torts. 346 U. S. at 44.⁸

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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APRIL 1956.

⁸ In the same footnote, the Court made passing reference to *Workman v. New York City*, 179 U. S. 552. It might be noted that the complaint in *Workman* was not grounded upon the failure to fight a fire with due care. Rather, the claim there was based on the allegedly negligent navigation of a fire boat on its way to a fire.

It might also be noted that Washington follows the general rule, referred to by the Court in *Dalehite*, "that an alleged failure or carelessness of public firemen does not create private actionable rights." See, e. g., *Lynch v. City of North Yakima*, 37 Wash. 657, 80 Pac. 79; *Cunningham v. City of Seattle*, 40 Wash. 59, 82 Pac. 143; *Lawson v. City of Seattle*, 6 Wash. 184, 33 Pac. 347.

FILED

APR 18 1956

HAROLD B. WELLEY, Clerk

In the
Supreme Court of the United States

OCTOBER TERM, 1955

No. ~~745~~ 45

RAYONIER INCORPORATED, a corporation, *Petitioner*,
vs.
UNITED STATES OF AMERICA, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

**REPLY BRIEF IN SUPPORT OF PETITION
FOR CERTIORARI**

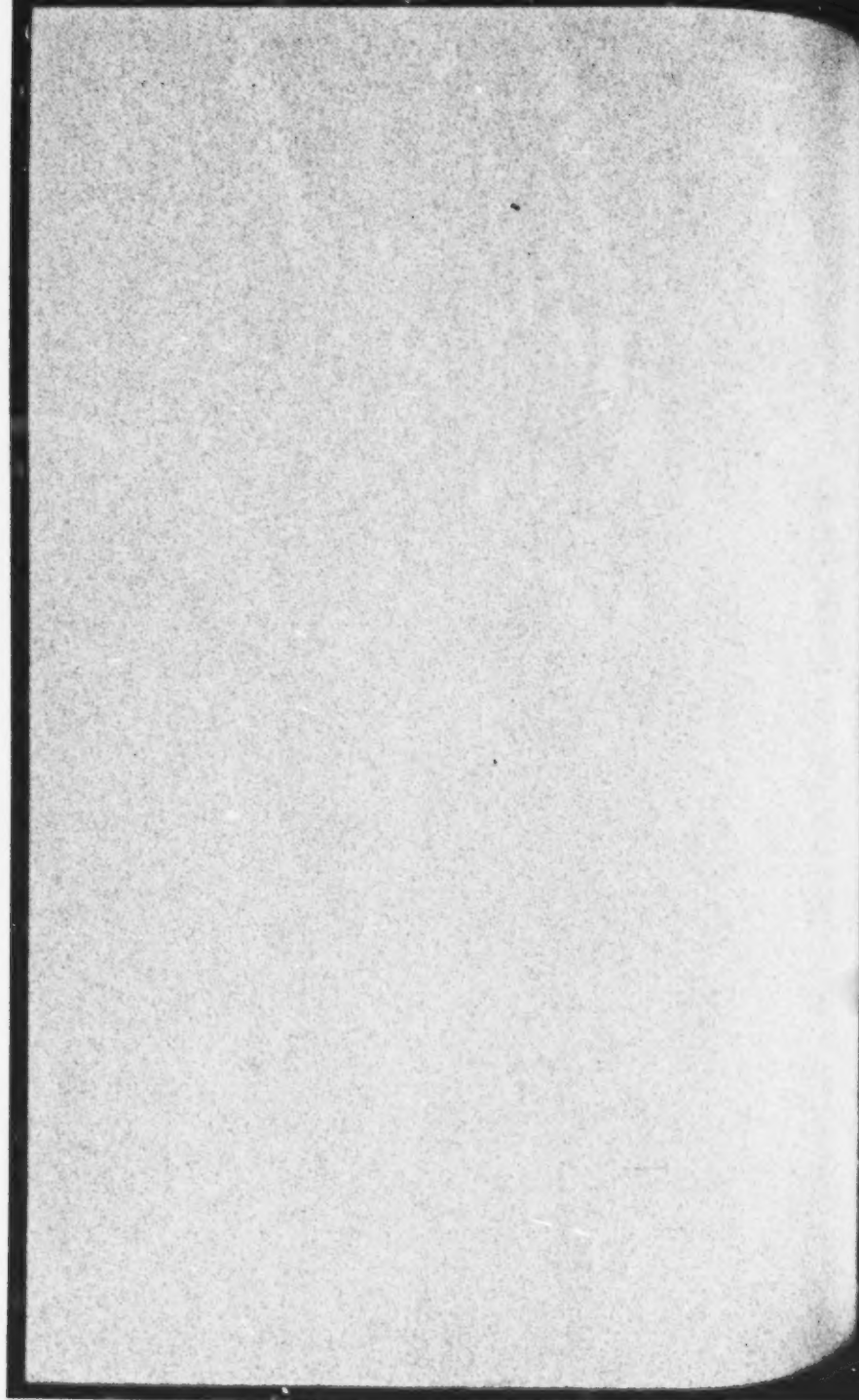
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**In the
Supreme Court of the United States**

OCTOBER TERM, 1955

No. 745

RAYONIER INCORPORATED, a corporation, *Petitioner*,
vs.
UNITED STATES OF AMERICA, *Respondent*.

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In the
Supreme Court of the United States
OCTOBER TERM, 1955

<hr/> RAYONIER INCORPORATED, a corporation, <div style="text-align:right"><i>Petitioner,</i></div> <div style="text-align:center">vs.</div> <hr/> UNITED STATES OF AMERICA, <i>Respondent.</i>	}	No. 745
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On page 2 of their Brief, Government counsel state three questions presented. While those questions are among the many raised in this case, we do not accept them as the sole questions nor in derogation of those stated in our Petition for Certiorari. Some discussion of the Government's questions 1 and 2 is in order.

PROXIMATE CAUSE

Proximate cause is a question of fact, not a question of law except in rare circumstances. It should be determined by the trier of the facts. *McInnis v. Squires* (1925) 136 Wash. 10, 238 Pac. 925; *McLeod v. Grant County School District* (1953) 42 Wn.2d 316, 255 P.2d 360; *Fleming v. Seattle* (1954) 45 Wn.2d 477, 483, 275 P.2d 904; *Palin v. General Construction Co.* (1955) 147 Wash. Dec. 223, 287 P.2d 325. Paragraph XXXVI of

the Complaint (R. 29) alleges that each of the acts of negligence described in the Complaint was a direct and proximate cause of the damage. That is sufficient under the Rules of Civil Procedure, Rules 8(e) and (f), and Forms 9 and 10, approved by Rule 84.

The Opinion is obscure and confusing on the question of proximate cause, intervening force and termination of risk. It says, Appendix D, p. 55:

“ * * * In our opinion it was this *recurrence* of fire on the 1600-acre tract which was the sole proximate cause of the injury to appellant's property and that risks, if any, created by the acts or omissions of agencies of the Government prior to the containment of the fire in the 1600-acre area had terminated. * * * ” (Emphasis added)

Why was such “recurrence” of fire the sole proximate cause? The Opinion does not explain. The fire did not recur. It was the same fire that started August 6 still burning, the same men still acting, the same timber which was in jeopardy, and the same dry weather conditions. The fire did not start in the 1600-acre tract. It would not have reached the 1600-acre tract nor even have started were it not for the conditions and events which occurred before it reached that tract.

When did the risks, created prior to the containment of the fire, terminate and what caused them to terminate? The Opinion does not explain. But its necessary implication is that when one responsible for the start of a fire has it contained and under control his duty has ended and the risk of fire has thereby terminated. That is contrary to Washington law.

The Washington statutes¹ establish that the risk from fire does not terminate until the fire is extinguished. They require, in so many words, that the landowner *and* the party responsible for the fire and the fire-hazardous conditions both control *and* extinguish the fire. A doctor's obligation does not end when he stops the flow of blood; he must disinfect the wound and sew it up. Half-way measures are no more tolerated by Washington forestry laws.

The authorities cited in Opinion footnote 1 in support of the quote suggest that the Court might have in mind some intervening force or superseding cause. Those authorities deal with unforeseeable intervening forces and superseding cause. They are not applicable to the case at bar because the Complaint here specifically alleges that everything contributing to the September 20 breakaway fire was foreseeable and could have been guarded against and avoided by prudent conduct. This includes the pre-August 11th condition of and practices on the Government-owned and controlled right of way and adjoining lands (R. 11-13) and the wind and weather (R. 10, 15, 23, 24, 27).

The only intervening force apparent to us is the Forest Service employees' negligence in doing nothing. The opinion quotes paragraph XXXII of the Con:

¹Am. Rem. Supp. 1945 §5806, R.C.W. 76.04.380. Appendix B, p. 35.

Am. Rem. Supp. §5807, R.C.W. 76.04.370. Appendix B, p. 36.

Rem. Rev. Stat. §2523, R.C.W. 76.04.220. Appendix B, p. 26.

Rem. Rev. Stat. §5818, R.C.W. 76.04.450. Appendix B, p. 38.

plaint, which describes the Forest Service doing nothing, and then simply says, Appendix D, p. 56:

“On these facts, liability may not be predicated on conduct occurring before the spread of the fire to the 1600-acre tract.”

The Opinion says that at this point the Forest Service employees became public firemen. It implies that if the Government is negligent only once in its capacity as landowner it will be held accountable, but if it is negligent twice, once as a landowner and later as a public fireman, it will not be liable at all.

CHARACTER OF RAILROAD RIGHT OF WAY

As they did in their brief to the Court of Appeals, Government counsel again mistakenly characterize the right of way which Port Angeles Western Railroad had across Government lands as one granted by the Government under the Right of Way Act of March 3, 1875, 18 Stat. 482, 43 U.S.C. §934 (Brief p. 12). This is misleading, outside the record, erroneous in fact and contrary to the allegations of the Complaint. The easement was *not* granted under the Right of Way Act of March 3, 1875.

The Complaint says (R. 11) that “defendant owned, had control of and free and unrestricted access to” the land where the fire started, including the right of way. That allegation must be accepted as true. Under it we are entitled and prepared to prove that such right of way as existed was granted years ago by a private party, the then owner of the right of way area and adjoining lands, to another private party; that the United States thereafter acquired the servient estate and ad-

joining lands in an exchange transaction with the private owner; and that still other agreements and relationships between the Government and the Railroad gave the Government control of the right of way even to the extent of suspending operations thereon.

The cases cited by Government counsel as defining the rights and obligations of parties under the Right of Way Act of March 3, 1875, simply are not applicable to the case at bar. The railroad cases cited by Government counsel on page 13 of the opposing brief are cases in which the injured plaintiff, typically the adjacent land owner whose barn has burned, has elected to sue the solvent railroad and has not been concerned about the liability of the servient owner. As a matter of fact, the railroads in these cases may have owned their rights of way in fee for all we are able to discover from the opinions. The other cases cited on pages 12, 13 and 14 deal with rights and obligations as between the owners of the dominant and servient estates. They do not deal with the obligations of the owner of the servient estate to third parties. It does not matter here whether the Government could look to the Port Angeles Western Railroad for indemnity against liabilities incurred by the Government. This suit involves the right of a third party who was damaged by negligent conditions and practices on Government-owned and controlled lands.

If we follow counsels' argument correctly it is their contention that the owner of timber land could log the timber, leave the slash and debris where it falls, and then escape all responsibility for the condition of the land simply by granting an easement across that land.

That is patently unsound. The owner of land cannot escape his obligations and duties to maintain it in a safe condition unless he parts with all right of control or access to the land. The owner of land over which an easement is granted has access thereto and can do anything on the right of way which does not interfere or conflict with the use of the easement.

We respectfully ask that the Petition for Certiorari be granted.

Respectfully submitted,

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SEP 13 1956

JOHN T. FEY, Clerk

No. 45

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October Term, 1956

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In the
Supreme Court of the United States

October Term, 1956

<hr/> RAYONIER INCORPORATED, a corporation, <div style="text-align:right"><i>Petitioner,</i></div> <div style="text-align:center">vs.</div> UNITED STATES OF AMERICA, <i>Respondent.</i> <hr/>	}	No. 45
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UPON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF PETITIONER

CITATIONS TO OPINIONS BELOW

The District Court for the Western District of Washington, Northern Division, did not write an opinion and its decision is unreported (R. 43, 63).¹ The Court of Appeals' opinion (R. 79-89) is reported in 225 F.2d 642.

JURISDICTION

The Court of Appeals' judgment was entered September 1, 1955 (R. 78-90). Petition for rehearing filed September 30, 1955, was denied October 14, 1955 (R. 90). A Second Petition for Rehearing (R. 92-124) was filed December 27, 1955, pursuant to leave granted (R. 91) and was denied February 17, 1956 (R. 125).

On January 10, 1956, Mr. Justice Douglas extended to March 12, 1956, the time for filing Petition for Certiorari (R. 125). Petition for Writ of Certiorari was

¹Portions of the District Court's remarks selected by stipulation of counsel appear in transcript of record (R. 33-66).

filed in this Court on March 9, 1956, and was granted April 23, 1956 (R. 126).

Jurisdiction of this Court is invoked under 62 Stat. 928, 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED

1. Is the United States liable under the Tort Claims Act for negligence of its employees fighting fire on cut-over lands adjacent to forested lands, or is it immune from such liability because of the "no analogous liability" theory of *Feres v. United States*,² and the "public fireman immunity" theory stated in *Dalehite v. United States*;³ and to what extent has the *Dalehite*

²340 U.S. 135 (1950).

³*Dalehite v. United States*, 346 U.S. 15 at 43-44 (1953).

"As to the alleged failure in fighting the fire, we think this too without the Act. The Act did not create new causes of action where none existed before.

"... the liability assumed by the Government here is that created by "all the circumstances," not that which a few of the circumstances might create. We find no parallel liability before, and we think no new one has been created by, this Act. Its effect is to waive immunity from recognized causes of action and was not to visit the Government with novel and unprecedented liabilities.' *Feres v. United States*, 340 U.S. 135, 142, 95 L.Ed. 152, 158, 71 S.Ct. 153.

"It did not change the normal rule that an alleged failure or carelessness of public firemen does not create private actionable rights. Our analysis of the question is determined by what was said in the *Feres* case. See 28 U.S.C. §§1346 and 2674. The Act, as was there stated, limited United States liability to 'the same manner and to the same extent as a private individual under like circumstances.' 28 U.S.C. §2674. Here, as there, there is no analogous liability; in fact, if anything is doctrinally sanctified in the law of torts it is the immunity of communities and other public bodies for injuries due to fighting fire. This case, then, is much stronger than *Feres*. We pointed out only one state decision which denied government liability for injuries incident to service to one in the state militia. That cities, by maintaining fire-fighting organizations, assume no liability for personal injuries resulting from their lapses is much more securely entrenched. The Act, since it relates to claims to which there is no analogy in general tort law, did not adopt a different rule. See *Steitz v. Beacon*, 295 N.Y. 51, 64 N.E.2d 704, 163 A.L.R. 342. To impose liability for the

statement been limited by *Indian Towing Company, Inc., v. United States*?⁴

2. Depending upon the extent by which the "no analogous liability" theory of *Feres* and the "public immunity" pronouncement of *Dalehite* have been limited by *Indian Towing*, primary or collateral questions include:

(a) Should not the "no analogous liability" theory be limited to analogous liability of private individuals except where the negligent act or omission has not been, at one time or another, or could not conceivably be, privately performed?

(b) Is there not parallel or analogous liability of private individuals, of municipal corporations, and even of the United States, each of which will support petitioner's claim?

(c) Are the reasons why and the circumstances under which municipal corporations are immune from liability for negligence of firemen, present in this case?

(d) If there is public fireman immunity, do not equally well established exceptions to that immunity apply?

Indian Towing Company, Inc., v. United States, 350 U.S. 61 (1955), holds that: (a) Municipal immunities do not apply to immunize the Government; (b) the Government may be liable for its negligence in performing even public or "uniquely governmental" functions; (c) Government liability is not predicated on the presence or absence of identical private activity or on whether a private party is likely to be performing such activity; (d) when Government undertakes services, inducing reliance, it will be liable if it fails to perform prudently as a volunteer; and (e) the Government should not be immunized from liability by technical, legalistic obscurities premised on fortuitous circumstances.

alleged nonfeasance of the Coast Guard would be like holding the United States liable in tort for failure to impose a quarantine for, let us say, an outbreak of foot-and-mouth disease."

(e) Does the "public firemen" status of employees immunize the Government in all fire fighting situations and, if not, is this not a case where the immunity should *not* apply?

(f) Are not the essential facts of *Dalehite* so different from those of the case at bar as to make *Dalehite* inapplicable as precedential authority?

3. Can the United States be liable for its negligence as a volunteer? The Court of Appeals decided not, in conflict with this Court's decision in *Indian Towing* and with the Fifth Circuit Court of Appeals' decision in *United States v. Lawter*, 219 F.2d 559 (5th Cir., 1955).

4. Is not the United States liable under the Tort Claims Act under circumstances where a private person would be liable to claimant in accordance with the law of the State of Washington:

- (a) Because of negligent failure to conform to standards set by Washington statutes relating to fire prevention and fire suppression on lands in forest areas;
- (b) Under common law as a landowner, as a volunteer and as a contractor with a third party for negligently failing to prevent and extinguish fire in forest areas?

5. Do Washington statutes Am. Rem. Supp. §5807; RCW 76.04.370 and Rem. Rev. Stat. §5818; RCW 76.04.450, Appendix B, *infra*, pp. 110, 112, impose liability without fault and are they pertinent in determining Government negligence and liability for failing to conform thereto? The Court of Appeals decided the statutes do impose liability without fault and are not

applicable to the Government, in conflict with the decision of the Fourth Circuit Court of Appeals in *United States v. Praylou*, 208 F.2d 291 (4th Cir., 1953), certiorari denied 347 U.S. 934 (1954).

6. Has the Court of Appeals, on a motion to dismiss for failure to state a claim, so construed the amended complaint as to do substantial justice, or has it so grossly misconstrued the amended complaint as to call for an exercise of this Court's power of supervision? Two important matters are involved: (a) An allegation that "defendant owned, had control of and free and unrestricted access to" lands, including the right-of-way thereon, was stated by the Court to mean that the defendant had only "a right to enter and inspect the right-of-way" (R. 85) (b) A fire which started August 6 burned continuously until after September 20. By August 11 it was contained and controlled in smoldering form within a 1600-acre area where it smoldered until September 20 when it broke out into the adjoining forests. The Court of Appeals said, " * * * it was this recurrence of fire on the 1600-acre tract which was the sole proximate cause of the injury * * * ." (R. 81). That statement is made despite allegations in the amended complaint describing negligent acts and omissions of Government employees prior to the outbreak of the fire and during the early stages of the fire as well as during the forty-day period of the smoldering fire, and the express allegation (R. 29) that each and every one of the negligent acts and omissions described proximately caused and contributed to the fire and the damage suffered by plaintiff. Vital questions as to relationships and duties of the parties and of proximate cause hinge

on the proper and fair construction of the complaint. A corollary question is whether negligence of Forest Service employees as a proximate cause of a fire is nullified as a proximate cause solely by the same employees donning firemen's hats and thereafter proceeding negligently in the immune status of "public firemen."

STATUTES INVOLVED

This case does not involve any constitutional provisions, treaties, ordinances, or regulations.

The following federal statutes, all of which are set out verbatim in Appendix A hereto, *infra*, pp. 91-96, are involved:

62 Stat. 933; as amended: 63 Stat. 62, 101	28 U.S.C. §1346
62 Stat. 982; as amended: 63 Stat. 106	28 U.S.C. §2671
62 Stat. 983;	28 U.S.C. §2674
62 Stat. 984; as amended: 63 Stat. 444 64 Stat. 1038, 1043	28 U.S.C. §2680
30 Stat. 35; as amended: 33 Stat. 628	16 U.S.C. §551
43 Stat. 653; as amended: 43 Stat. 1127 44 Stat. 242 61 Stat. 449	16 U.S.C. §565

The following Washington State statutes, all of which are set out verbatim in Appendix B, *infra*, pp. 97-113, are involved:

Rem. Rev. Stat.	§950;	RCW 4.08.110
	§951;	120
	§2523;	RCW 76.04.220
	§5647;	RCW 4.24.040
	§5648;	050
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	§5784;	RCW 76.04.050
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Am. Rem. Supp. 1945	§5792-1;	230
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	§5804;	350
Am. Rem. Supp. 1945,	§5806;	380
Am. Rem. Supp.	§5807;	370
Rem. Rev. Stat.	§5808;	400
Rem. Supp. 1949,	§5817-1;	410
Rem. Rev. Stat.	§5818;	450

The Federal Tort Claims Act, 62 Stat. 983, 28 U.S.C., §2674 *et seq.*, states that:

"The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages."

62 Stat. 933, as amended 63 Stat. 62, 101; 28 U.S.C. §1346(b) gives District Courts:

“ * * * exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, * * * caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.”

STATEMENT OF THE CASE

This is a suit under the Tort Claims Act where damages occurred on and after September 20, 1951, from fire which started August 6th and burned continuously until after September 20. The Respondent's motion to dismiss the amended complaint for failure to state a claim on which relief can be granted, was granted by the District Court (R. 66-67) and affirmed by the Court of Appeals (R. 90).

The District Court's jurisdiction was conferred by 62 Stat. 933, as amended 63 Stat. 62, 101; 28 U.S.C. §1346(b) and 62 Stat. 982-84, as amended 63 Stat. 106, 444 and 64 Stat. 1038, 1043; 28 U.S.C. §§2671-2680, Appendix A, *infra*, pp. 91-94, the negligent acts and omissions complained of having occurred and the damage having been sustained in the Western District of Washington, Northern Division (R. 3).

The amended complaint has been carefully drawn and worded and we urge full reading thereof (R. 3-33). It alleges, among other things, the following:

On the Olympic Peninsula in Washington the United States owns timberlands, some of which are cutover, administered by the Forest Service of the Department of Agriculture for timber sales to private industry. Privately owned timber and timberlands are adjacent to and intermingled with Government lands (R. 4-6). On and for many years prior to August 6, 1951, the Government owned certain lands across which was the railroad right of way of the Port Angeles Western Railroad, and the immediately adjacent lands. The Government "owned, had control of and free and unrestricted access to" said right of way and adjacent lands (R. 11). On the right of way and adjacent lands of the Government were accumulations of logging and clearing debris, rotten ties, dry grasses, brush and trees which constituted a fire hazard under the statutes of Washington, all of which the Forest Service employees knew. The railroad company operated defective and deficient equipment over the right of way and failed to have its passing trains followed by a speeder or other equipment to watch for fires that might be caused by the train, contrary to the requirements of Washington statutes, all of which was known to the Forest Service employees. The Forest Service employees had the right and duty to abate or cause to be abated the aforesaid fire hazardous conditions and practices (R. 11-13).

About noon, August 6, 1951, approximately six spot fires caused by a passing train started on and in the vicinity of the right of way on Government lands. Five of them were soon extinguished and the sixth could have been but wasn't. The fire continued to spread and by nightfall covered about sixty acres, where it was con-

fined and controlled. It could have been extinguished but wasn't. About 2:30 p.m. on August 7th, the fire broke away and spread over a 1600-acre area of logged-off lands. The fire in the 1600-acre area was contained and controlled by August 11th (R. 12-15). It remained in smoldering form until the early hours of September 20th, when sparks from it blew into the nearby slash and timber and a tremendous forest fire resulted which burned an area ranging up to five miles in a north-south direction and twenty miles in an east-west direction (R. 15, 18-25). That fire caused the damage complained of (R. 29).

The Forest Service District Ranger was immediately informed of the outbreak of the fire on August 6th, and the District Ranger and his subordinates immediately assumed, took over and exercised exclusive supervision, direction and control of all activities in connection with the fighting and suppression of the fires and continued to do so at all times thereafter. Petitioner, in common with other timber operators in the area, knew of those facts and relied upon the District Ranger and his subordinates to carry on said activities at all times (R. 13-14).

Fifteen negligent acts and omissions proximately causing the damage are alleged (R. 26-29). Without hereby waiving any of the claims of negligence or intending to limit them, the negligence may generally be classified as follows: Permitting and failing to abate the long continued existence of fire hazardous conditions on the Government's lands, contrary to the law and statutes of the State of Washington (R. 11-12, 7-8); permitting and failing to abate the operation of defective and deficient equipment on those lands by the Port An-

geles Western Railroad, and permitting and failing to abate improper practices by the railroad, all of which constituted fire hazards and were contrary to law and statute (R. 11-13, 7-8); failing to control and completely extinguish the fire in each of its three early stages, that is, at the spot fire stage, the 60-acre stage, and the 1600-acre stage (R. 15, 17-26); failing to use sufficient men and equipment and adequate methods to control, hunt out and extinguish all fire, although sufficient men, equipment and water were at all times available and there was ample time in which to perform the work (R. 18); and lastly, in continuing negligent and inadequate practices in the face of weather conditions, weather forecasts, fuel conditions, topography, and the tremendous value of property which was in jeopardy because of the smoldering fire (R. 10, 20-21, 23).

The Government's land and timber need looking after just as do the land and timber owned by private parties. Like private property owners, the Government employs caretakers whose duties are many and varied. As caretakers, the District Ranger and his crew had the duty to see that the Government's lands were maintained and kept in the manner required of all such land-owners by the law and the statutes of the State of Washington; to patrol and inspect all lands in the area; to discover, eliminate and abate conditions thereon which constituted fire hazards; to watch for the outbreak of fire, and when fire occurred within the area, to fight and use every reasonable effort to control and extinguish the same; and to supervise, direct and control activities in fighting and suppressing such fires.

They had the authority and power to hire men and equipment to fight fires, and to summon and impress help to prevent, suppress and control fires (R. 8-10, 16-18).

A large area of lands, including those mentioned in the complaint, had, by contract between the Forest Service and the State of Washington, been established as a Forest Service Protective Area. By said contract the Forest Service agreed to protect said area against fire and to take immediate, vigorous action to control all fires originating on or threatening such lands. The contract also provided, among other things, as follows (R. 6-7):

“9. Nothing herein contained shall be understood to impair the right of the United States, the State of Washington, or any person or corporation to recover the costs of suppression and damages on account of fires resulting from the negligent, wilful, or unlawful act of any forest landowner or timber operator within said protective units or any other person or corporation, or to impair any other rights of similar nature under the Washington Forestry Laws, under the Federal laws, or under general law.”

Protection and preservation of the forests is a matter of first concern, both to the residents of the area and to the timber and mill operators. As a consequence, men willingly and voluntarily respond to calls for assistance in fighting fires, and owners of equipment willingly and voluntarily furnish their equipment. A Fire Suppression Plan for the Forest Service Protective Area had previously been adopted and approved by the Supervisor of the Olympic National Forest, and was to be

followed and employed by the District Ranger and his subordinates. That Plan was in effect at all times involved. The Plan included, among other things, a list of privately employed men who and privately owned equipment which were available to fight and suppress any fire within the Area, and the method of getting such men and equipment to the scene of the fire. Additional men and equipment were also available. The Plan contemplated that the District Ranger and his subordinates would call upon and use all men and equipment necessary to suppress and extinguish fires, and it was one of the District Ranger's duties to do so. The Forest Service did not own, maintain or operate a fire department or fire fighting organization as such, but, just as other owners of timber and timberlands in the area, it had some men and equipment available to fight fires, and knew where additional men and equipment could readily and quickly be obtained (R. 16-18).

There are two rivers in and adjacent to the 1600-acre area which could provide more than enough water to supply all conceivable requirements in fighting the fire. There were usable and safe roads both within the 1600-acre area and the lands adjacent thereto providing access to all parts of it. The nearby railroad could also be utilized (R. 19-20).

Fires smolder and burn in debris, logs and stumps for long periods with no visible flame. That was the condition which continued in the 1600-acre area from August 11th to September 20th, when the fire broke away (R. 21-22). The Forest Service employees knew this. They could have combed the area, and especially the key points, with men and equipment to search out

and extinguish all such smoldering fire (R. 6-9, 21-23). Notwithstanding this, notwithstanding the extremely dry and hazardous conditions which had prevailed for four months prior to August and during all times mentioned in the amended complaint, and notwithstanding the extensive stands of timber which were imperiled, the Forest Service did practically nothing for the forty days from August 11th to September 20th (R. 10, 4-5, 21).

Northeasterly winds are not uncommon in the area. They are dry winds, decreasing the humidity and increasing the fire hazard. Such winds, sweeping over the 1600-acre area, would naturally carry sparks westerly and southerly into the big timber. On September 13th, such a wind blew sparks out of smoldering debris near the westerly boundary of the 1600-acre area, causing a fire close by. That incident occurred when men were present, and as a consequence the fire was extinguished (R. 20-23).

With full knowledge of all the foregoing, the District Ranger, Sanford Floe, and his assistants, employed only a few men and a few items of equipment and tools during the forty days, keeping the area mostly on a patrol basis during the day and maintaining no men on the job and no lookouts after the normal working day (R. 21-25).

In spite of weather forecasts of northeasterly winds and decreasing humidity, the same indifferent practice was followed by the Forest Service employees on September 19th and 20th. The anticipated wind blew sparks from the 1600-acre area into the adjoining slash and timber, and the big fire was under way (R. 20-26).

Petitioner's timber, lands, railroad, bridges, telephone system and other property were damaged or rendered useless by the fire and Petitioner incurred expenses in connection therewith, for which recovery is sought in the amount of \$1,130,295.52 (R. 29-33).

SUMMARY OF ARGUMENT

I.

None of the statutory exceptions to the waiver of immunity, as set forth in 28 U.S.C., §2680, is involved. All acts and omissions complained of were at the operational level.

The courts below said that under *Dalehite v. United States*, the Government cannot be held liable for the negligence of Forest Service employees in fighting a fire in a forest area because in so acting the Forest Service employees are public firemen. The language in the *Dalehite* case is: "Here, as there, there is no analogous liability; in fact, if anything is doctrinally sanctified in the law of torts it is the immunity of communities and other public bodies for injuries due to fighting fire." That language in turn is premised upon language of *Feres v. United States*, which is: "We find no parallel liability before, and we think no new one has been created by, this act. Its effect is to waive immunity from recognized causes of action and was not to visit the Government with novel and unprecedented liabilities."

In ascertaining to what or to whose liability a parallel or analogy must be found in order to make the United States liable under the Federal Tort Claims Act, we cannot look for prior analogous liabilities of

the United States or of the several states because those are sovereigns and they have had no prior tort liabilities except such as they may have expressly conceded by statute. We cannot look for prior analogous liabilities of municipal corporations because of the reasons stated in *Indian Towing Company v. United States*. One must therefore look for parallel or analogous liability of private individuals, which is the test expressly provided in the Tort Claims Act which states that the United States will be liable "in the same manner and to the same extent as a private individual under like circumstances."

Petitioner's case is supported by parallel liability of private individuals; of private fire-fighting companies; of municipal corporations, both as an actor and as a landowner on whose land fire has originated or from which it spread; and of the United States itself in the performance of equally public functions for the general welfare, *e.g.*, negligent acts of soldiers, military airplane pilots, Coast Guard rescue crews, airport control tower operators.

Immunity from liability for negligence of firemen is a doctrine peculiar to municipal corporation law. The reasons why and circumstances under which municipal corporations have been held immune are not present in the case at bar for the following reasons:

(a) The Forest Service employees were not public firemen because they were primarily caretakers of Government timberlands and fire fighting was only one of many of their duties.

(b) The employees were caring for property which

the Government owned in a proprietary capacity and their services were for the direct and special benefit of the Government.

(c) The employees were engaged to look after the Government timber alone and not the property of other parties; fighting fire on other's lands was for the end purpose of protecting Government property. The Secretary of Agriculture was not authorized to provide fire-fighting service for the public at large but only to lend assistance and cooperation in order to protect Government timber.

II.

The Government is liable as a volunteer, it having assumed and undertaken exclusive supervision and control of fighting the fire involved and induced reliance thereon by petitioner. Having done so, it was bound to act with due care and is liable for its negligence. The court below ruled that under *Dalehite v. United States*, the Government cannot be said to assume the common law obligation of a volunteer. That ruling is in conflict with the Supreme Court decision in *Indian Towing Company v. United States* and with the decision of the Fifth Circuit Court of Appeals in *United States v. Lawter*, both of which hold the United States liable as a volunteer.

III.

The United States is liable in the case at bar because an individual under like circumstances would be liable:

- (a) Under the Washington statutes; and
- (b) Under Washington common law as a landowner,

as a volunteer, and for negligence in performing a contract.

Washington forestry statutes make *both* the owner of the land *and* the party responsible for its condition, obligated to eliminate fire-hazardous conditions and practices on lands and to fight and pursue fires originating thereon or spreading therefrom. The United States owned, had control of and free and unrestricted access to lands upon which this fire started. The fire started when defective railroad equipment was permitted to operate over the Government lands and threw sparks into the inflammable materials which the Government, contrary to Washington statutes, had permitted to remain on those lands. An individual would be negligent in permitting those fire-hazardous conditions and practices on his lands, and liable for the consequences of that negligence. A private individual would have the duty, under Washington statutes, to pursue and use all prudent means to extinguish the fire, failure to do which would constitute negligence. The Government, having the same liabilities as an individual, is also negligent and liable. The Government could have *prevented* the fire but negligently failed to do so. The Government could have extinguished the fire but negligently failed to do so at each of three different stages: the spot-fire stage, the 60-acre stage to which it spread during the first few hours, and during the forty-day period in which the fire was contained and controlled in smoldering form on the 1,600-acre area. Ample men, equipment and water were available but not used.

The common law, as interpreted by numerous Wash-

ington decisions, is substantially the same as statutory law with respect to the duty to guard against, fight and pursue fire originating on one's lands, and an individual would have been liable under the circumstances of the case at bar.

An individual, acting as a volunteer and undertaking exclusive supervision and control of the fire-fighting activities and inducing reliance on such undertaking, would be required to use due care and would be liable for failure to do so. Under the Tort Claims Act, the Government is likewise liable.

The Government was party to a contract with the State of Washington, in which the Government agreed to supervise fire fighting in the general area in which the fire occurred. Even though petitioner was not a party to that contract, it was entitled to rely upon the Government's performance of those contractual obligations in a prudent manner. Failure of the Government so to perform the same constituted negligence. An individual under like circumstances would be liable and therefore the Government is liable.

IV.

Two Washington statutes, Rem. Rev. Statutes §§5807 and 5818 (RCW §§76.04.370 and 76.04.450), set standards of care for conditions of and practices on lands in forest areas. Petitioner contends that failure to conform to those standards is negligence. Of those statutes the Court of Appeals said that they purport to impose liability without fault and that the *Dalehite* case does not waive immunity of the United States in such actions. That holding is in conflict with the decision of

the Fourth Circuit Court of Appeals in *United States v. Praylou*, in which case this court denied Certiorari. The *Praylou* case holds the Government liable under the Tort Claims Act by reason of a South Carolina statute imposing absolute liability for injuries caused by a falling aircraft. The Washington statutes do not impose absolute liability under the ruling of the Washington Supreme Court in *State of Washington v. Canyon Lumber Corporation*. But whether they do or do not impose absolute liability, they are still pertinent and applicable as establishing standards to which lands in forest areas must be maintained for the safety and welfare of persons and property in the state. If private individuals fail to conform to those standards, they are negligent; and negligence of the United States under the Tort Claims Act must be measured by the same standards.

V.

The fire started on lands through which is the railroad right of way of Port Angeles Western Railroad. The amended complaint alleges that the Government "owned, had control of and free and unrestricted access to" the right of way and adjoining lands (R. 11). Also the complaint alleges that the fire started "on and in the vicinity of the right of way" (R. 12). The court below characterizes the Government's interest in these lands, including the right of way, as "a right to enter and inspect the right of way."

In Washington special responsibilities attach to ownership and control of land. The extent of the Government's ownership and its right of control of and re-

sponsibility for conditions on the land where the fire started, including the right of way over which the defective railroad equipment was operated, are matters of primary importance. If one owning or having control of the land has a right and duty to abate fire-hazardous conditions and practices thereon and to fight and pursue fire originating thereon, it is essential to determine the fact of ownership and control. The language of the complaint is broad and under it petitioner would be entitled, and is prepared, to prove that such right of way as existed was granted years ago by a private party, the then owner of the right-of-way area and adjoining lands, to another private party; that the United States thereafter acquired the servient estate and adjoining lands in an exchange transaction with the private owner, and that still other agreements and relationships between the Government and the railroad gave the Government access and effective control.

Rules of Civil Procedure, Rule 8(f), require that all pleadings shall be so construed as to do substantial justice. On a motion to dismiss which challenges the sufficiency of an amended complaint to state a claim upon which relief can be granted, the amended complaint must be construed in a light most favorable to plaintiff, with all doubts resolved in plaintiff's favor and all allegations accepted as true.

The Court of Appeals has so far departed from these rules of construction and has so misconstrued the clear allegations of the amended complaint as to deprive petitioner of its day in court and to call for an exercise of this court's powers of supervision.

VI.

The fire started August 6, 1951, and burned continuously until after September 20. By August 11, it was contained and controlled in smoldering form within a 1,600-acre area. The Court of Appeals said: "It was this recurrence of fire on the 1,600-acre tract which was the sole proximate cause of the injury." The amended complaint alleges acts of negligence of the Government before the fire started, at the spot-fire stage, at the 60-acre stage. and at the 1,600-acre stage. It further alleges that each of these acts of negligence was a direct and proximate cause of the injuries sustained. The complaint should be construed so as to do substantial justice, and in a light most favorable to plaintiff. Forms 9 and 10, approved by Rule 84, indicate that in pleading proximate cause it is necessary only to state the facts and then say: "As a result plaintiff [was injured]." Under numerous decisions, proximate cause is a question of fact to be determined by the trier of the facts and not by the court as a matter of law. Again we believe the Court of Appeals has so grossly misconstrued the pleading and departed from established rules of construction as to require the exercise of this court's powers of supervision.

ARGUMENT

PART ONE

Questions 1 and 2

1.00 There Is Analogous Liability for Petitioner's Claim. The "Public Fireman Immunity" Theory Is Inapplicable.

The Court of Appeals said that the activities of the Forest Service here involved were a "*public function*"; that the Forest Rangers acted in the capacity of "*public firemen*" and "*public servants*"; and that their activities were without the area of the waiver of sovereign immunity contained in the Tort Claims Act. That holding was explicitly based on *Dalehite v. United States*, 346 U.S. 15 (1953).

That holding was in error and it presents Questions 1 and 2 in this appeal stated *supra*, pp. 2-3.

In effect, the Court below decided this case as if the Federal Tort Claims Act had never been enacted, for its decision was in spite of the Act—not because of anything stated in it. *The "discretionary function" exception contained in 62 Stat. 984, 28 U.S.C. §2680 (a), is not involved here because all acts and omissions complained of were at the operational level. Neither that exception nor any other part of §2680 is applicable or contended for by Government counsel nor pointed to by either of the courts below as a basis for their holdings.*

Since § 2680 is not applicable, Government counsel argue, and the Court below held, that petitioner's claim is barred under the "public firemen immunity" holding of *Dalehite v. United States*, which holding, in turn, is based upon the "no analogous or parallel liability"

statement of *Feres v. United States*, 340 U.S. 135 (1950).

The "no analogous liability" theory is not applicable to the case at bar because there is analogous liability of private individuals, of municipal corporations, and even of the United States to support petitioner's claim. Analogous liability of private individuals is all that is necessary.

The "public firemen immunity" theory is not applicable because:

(a) That theory is peculiar to municipal corporation law, which law is specifically renounced by *Indian Towing Company, Inc., v. United States*, 350 U.S. 61 (1955).

(b) The Forest Service employees were not public firemen.

(c) The reasons why and circumstances under which a municipal corporation is immune from liability do not exist in the case at bar.

(d) The "public" character of the Forest Service employees' functions and activities is immaterial in the determination of Federal tort liability.

Discussion of analogous liability and the applicability of the "public firemen immunity" theory follows.

1.01 Analysis of "No Analogous Liability" Theory.

Before pointing specifically to the analogous liability which supports the petitioner's claim, a brief analysis of the "no analogous liability" theory is in order.

In the *Indian Towing* case this Court pointed out

that *Feres v. United States* held only that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen when the injuries arise out of or are in the course of activity incident to service. Without exception, the relationship of military personnel to the Government has been governed exclusively by federal law." 340 U.S. 146. Since the maintenance and operation of a national army is the exclusive right of the sovereign, and because servicemen, all being in the employ of the same master and engaged in extra-hazardous occupation, no member of the Armed Services on active duty may recover from the Government for negligence of others in the Armed Services on active duty. Under our Constitution no private person could raise and maintain an army, and hence no private person could be under like circumstances. Hence, the language of the *Feres* case is not inappropriate as applied to the facts in that case, for there could be no parallel or like circumstances.

The principle underlying the decision in the *Feres* case is difficult to put into words with the preciseness necessary for a legal axiom of general application to the Federal Tort Claims Act.

To what or to whose liability are the facts of a given claim to be parallel or analogous before the United States is liable in tort? The only liabilities to which a parallel can be drawn are those of: (i) the United States, (ii) the several States of our nation, (iii) municipal corporations, or (iv) private individuals. We can think of no others.

(i) Certainly, the parallel cannot be to those liabili-

ties of the United States which existed before enactment of the Federal Tort Claims Act, for there were no such liabilities except those which had been expressly conceded by statute. To require such parallelism would frustrate and defeat the Act and that obviously is not the Congressional intent.

(ii) It cannot be to the liabilities of the several States, for States also have sovereign immunity except as and to the extent that they severally and explicitly may have waived that immunity. To hold otherwise also would defeat the Federal Tort Claims Act.

(iii) It is not the liabilities of municipal corporations to which the parallel may be drawn. In *Indian Towing Company, Inc., v. United States*, this Court explicitly renounced municipal corporation law as determinative or pertinent in testing for liability of the United States under the Federal Tort Claims Act. The court said, 350 U.S. 61, 100 L.Ed. (Advance p. 86) (1955):

“Furthermore, the Government in effect reads the statute as imposing liability in the same manner as if it were a municipal corporation and not as if it were a private person, and it would thus push the courts into the ‘governmental’-‘non-governmental’ quagmire that has long plagued the law of municipal corporations. A comparative study of the cases in the forty-eight States will disclose an irreconcilable conflict. More than that, the decisions in each of the States are disharmonious and disclose the inevitable chaos when courts try to apply a rule of law that is inherently unsound. The fact of the matter is that the theory whereby municipalities are made amenable to liability is an

endeavor, however awkward and contradictory, to escape from the basic historical doctrine of sovereign immunity. The Federal Tort Claims Act cuts the ground from under that doctrine; it is not self-defeating by covertly embedding the casuistries of municipal liability for torts."⁵

We advanced that same argument to the court below both before the *Indian Towing* decision was rendered and again, in our Second Petition for Rehearing, after the *Indian Towing* decision.

(iv) Since the parallel or analogy cannot properly be drawn to liabilities of the United States, the States or municipal corporations, there remains to be considered only the liabilities of private individuals. This leads us directly back to the Federal Tort Claims Act which, in so many words, states that the parallel or analogous liability by which the United States' liability must be tested is the liability of a private individual

*As further evidence of the disharmony and confusion which would result from an extension of municipal corporation law to the Federal Tort Claims Act, we direct attention to the fact that in the State of Washington there are variances in liabilities and immunities of different classes of municipal corporations and political subdivisions. In Washington there is in effect the following statute, Rem. Rev. Stat. §951, RCW 4.08.120:

"§951. *Actions against public corporations.* An action may be maintained against a county, or other of the public corporations mentioned or described in the preceding section (county, incorporated town, school district or other public corporation of like character in this state) either upon a contract made by such county or other public corporation in its corporate character, and within the scope of its authority, or for an injury to the rights of the plaintiff arising from some act or omission of such county or other public corporation. (L. 69, p. 154, §602; Cd. '81, §662; 2 H.C. §672)."

This statute has been interpreted so that it is now inapplicable to cities, but the waiver of immunity with respect to counties, even in their performance of governmental functions as distinguished from proprietary functions, has been affirmed in *Whiteside v. Benton County*, 114 Wash. 463, 195 Pac. 519 (1921).

under like circumstances in accordance with the law of the place where the act or omission occurred.

Waiving aside the contention that public or governmental activity, as such, has any pertinence in testing for liability under the Tort Claims Act, this Court said in *Indian Towing Company, Inc. v. United States*, 350 U.S. 61, 100 L.Ed. (Advance p. 88) (1955):

“ * * * The broad and just purpose which the statute was designed to effect was to compensate the victims of negligence in the conduct of governmental activities *in circumstances like unto those in which a private person would be liable* * * *.”
(Emphasis supplied)

1.02 There Is Analogous Liability for the Negligence in the Case at Bar.

Petitioner's claim is supported by analogous liability, not only of private individuals but of municipal corporations and of the United States itself.

Private individuals would be liable under Washington statutes, under common law, both as a landowner and as a volunteer, and under contract with a third party. For full discussion of liability of private individuals see this brief *infra*, pp. 47-67.

Private individuals are obligated to fight fire originating on or spreading from their lands and are liable for their negligence in failing to fight the fires properly. *Sandberg v. Cavanaugh Timber Co.*, 95 Wash. 556, 164 Pac. 200 (1917); *Jordan v. Spokane, Portland & Seattle R. Co.*, 109 Wash. 476, 186 Pac. 875 (1920). To the same effect is *McCann v. Chicago, Milwaukee & Puget Sound Railway Company*, 91 Wash. 626, 158 Pac. 243

(1916); *Lehman v. Maryott & Spencer Logging Co.*, 108 Wash. 319, 184 Pac. 323 (1919). Such liability attaches even though the fire fighting is done on behalf of the property owner by State fire wardens. *Galbraith v. Wheeler-Osgood Co.*, 123 Wash. 229, 212 Pac. 174 (1923); *Wood & Iverson, Inc. v. Northwest Lumber Co.*, 138 Wash. 203, 244 Pac. 712 (1926).

Private fire fighting companies are liable for their negligence while performing the same functions as a municipal fire department. Such companies do not enjoy immunity even though performing their services pursuant to contract with a municipality. *Voltz v. Orange Volunteer Association*, 118 Conn. 307, 172 Atl. 220 (1934) in which there was negligent driving of a fire truck en route to a fire; and *Doherty v. Oakland Beach Volunteer Fire Company*, 70 R.I. 446, 40 A.2d 737 (1944) in which there was negligent driving of a fire fighting vehicle en route to render rescue services.⁶

⁶It is appropriate at this point to quote from the Government's brief in the court below. On page 38 of that brief, Government counsel state:

"Translated into the terms of the instant case, appellant's claim is barred because it rests on the asserted failure of the Forest Service to extinguish properly the forest fire, the fighting of forest fires being one of the very duties the Forest Service performs (unlike private persons) for the benefit of the public at large. Had the claim rested on damages suffered as the result of a collision between a Forest Service vehicle engaged in fighting the fire, however, it would not have been so barred. In such circumstances the failure to perform the governmental function of fire suppression would not have been involved. Indeed, from the standpoint of such a claimant, whether the public duty to suppress the fire had been carried out or not would have been of no consequence whatsoever."

We have never been able to understand the processes by which Government counsel reached the conclusion stated in the above quote. Apparently a somewhat parallel argument was made in the *Indian Towing* case because in its opinion this Court states a hypothetical set of circumstances under which a Government employee commits a series of negligent acts, for some of which, under the Government's theory, the United States would be liable and for some it would not. This Court

A municipal corporation was held liable for negligence of its employees in a fire fighting activity in *Workman v. New York City*, 179 U.S. 552 (1900). A fire boat en route to a fire was negligently operated by municipal employees. This Court held that maritime law was applicable and that immunity under municipal corporation law could not be invoked. The case demonstrates that liability of a community for negligence of its firemen is not a novel concept.

Municipal corporations also have been held liable for damages caused by fire which was negligently permitted to spread from their lands. See: *City of Denver v. Porter*, 126 Fed. 288 (8th Cir. 1903) where fire spread from a city refuse dump; *State v. City of Marshfield*, 122 Ore. 323, 259 Pac. 201 (1927) where fire spread from a city park; and *Osborn v. City of Whittier*, 103 Cal. App.2d 609, 230 P.2d 132 (1951) where fire spread from a city garbage dump.⁷

Under similar circumstances Washington municipal corporations have been held to be liable for the negli-

⁷ Additional cases from other jurisdictions are: *City of Denver v. Davis*, 37 Colo. 370, 86 Pac. 1027 (1906); *Herrick v. City of Springfield*, 288 Mass. 272, 192 N.E. 626 (1934); *Enterprise Garnetting Co. v. Forcier*, 67 R.I. 336, 23 A.2d 761 (1941); *Peterson v. City of Gibson*, 322 Ill. App. 97, 54 N.E.2d 79 (1944); *Atwater v. City of Toledo*, 163 Ore. 193, 96 P.2d 1081 (1939); *Adams v. City of Toledo*, 163 Ore. 185, 96 P.2d 1078 (1939); *Pittam v. City of Riverside*, 128 Cal. App. 57, 16 P.2d 768 (1932).

refused to follow the Government's reasoning and stated that it was not the intention of Congress "to draw distinctions so fine spun and capricious as to be almost incapable of being held in the mind for adequate formulation." In our judgment any member of the Bar would find it difficult to explain to a layman why a fireman, driving in haste (and understandably so) on his way to a fire, could create liability for negligent driving, but when he reaches the fire could stand by and watch the house burn to the ground without making any effort to put it out and would create no liability for the latter event.

gent control of fire. In *Seibly v. Sunnyside*, 178 Wash. 632, 35 P.2d 56 (1934) the City was burning weeds alongside a highway within the city limits during a wind storm. The City took no precaution to warn travelers on the highway and failed to exercise ordinary care to control the fire. The jury held the City liable to the owner of personal property burned when the truck on which it was loaded passed along the highway in the vicinity of the fire.

The issue of municipal immunity was strongly argued in *Babcock v. Seattle School District No. 1*, 168 Wash. 557, 12 P.2d 752 (1932). In order to clear a site preparatory to constructing a school building, the School District contracted to have some old houses burned. The contractor negligently permitted the fire to spread beyond his control, causing the destruction of the plaintiff's nearby residence. The Court held that the facts that a municipal corporation is supported by taxation and devotes its energies to the general welfare are insufficient reasons to immunize it from liability for the negligent control of a fire.

The United States itself was held liable, on a claim arising out of a contract, for damages resulting from fire in a case of considerable significance, *Bloedel Donovan Lumber Mills v. United States*, 74 F. Supp. 470 (Ct. Cl. 1947), certiorari denied, 335 U.S. 814, 93 L.Ed. 369. In that case the plaintiff was awarded damages caused by fire which was set to burn slash at the direction of the same District Ranger Floe who is involved in the case at bar. Almost nine years to the day prior to the fire involved in our case, Ranger Floe insisted that a slash fire be set in this same general

area under very similar weather conditions and in the face of similar wind and weather forecasts. His decision there was in the performance of his job as District Ranger. Certainly if it had been felt that his act was in performance of a governmental function, or if there was no analogous liability, or if this were a novel or unprecedented liability, the court would not have found for the plaintiff. Instead the court said, page 477:

“Naturally the defendant could not be held liable for ordinary mistakes or errors of judgment. These are inevitable. But viewing all the evidence and circumstances we cannot escape the conclusion that the action of Floe was either arbitrary or negligent and that defendant is responsible for the damages that reasonably could have been foreseen as the natural and probable result of the action taken.”

1.03 The “Public Fireman Immunity” Theory Is Not Applicable.

The public fireman immunity statement in *Dalehite v. United States* is based squarely on the no-analogous liability theory. Regardless of the effect which *Indian Towing Company, Inc. v. United States*, and the foregoing analysis may have upon the *Dalehite* statement, the “public firemen immunity” theory is not applicable to the case at bar for several reasons.

1.031 The “Public Fireman Immunity” Theory Is Peculiar to Municipal Corporation Law.

We have not found, and Government counsel have not cited, any cases in which immunity from liability for the negligence of firemen is applied except in suits against municipal corporations. Immunity from liabil-

ity for acts of firemen is a doctrine of municipal corporation law. The reasons why and the circumstances under which municipal corporations have been held immune are summarized by Dillon on Municipal Corporations, Fifth Edition, Vol. IV, p. 2895, §1660, in which that learned author states:

“The exemption from liability in these and the like cases is upon the ground that the service is performed by the corporation in obedience to an act of the legislature; is one in which the corporation, as such, has no particular interest, and from which it derives no special benefit in its corporate capacity; that the members of the fire department, although appointed, employed, and paid by the city corporation, are not the agents and servants of the city, for whose conduct it is liable; but they act rather as officers of the city, charged with a public service, for whose negligence in the discharge of official duty no action lies against the city, without being expressly given; the maxim of *respondent superior* has, therefore, no application.”

In *Workman v. New York City*, 179 U.S. 552 (1900), this Court held the City of New York liable under maritime law for the negligent operation of a fireboat, even though acknowledging at the same time that under municipal corporation law the City would be immune. In discussing municipal corporation law, this Court quoted from the lower court as follows:

“It is familiar law that the officers selected by a municipal corporation to perform a public service for the general welfare of the inhabitants or the community, in which the corporation has no private interest and from which it derives no special benefit or advantage in its corporate capacity,

are not to be regarded as the servants or agents of the municipality, and for their negligence or want of skill it cannot be held liable. This is so, notwithstanding such officers derived their appointment from, and are paid by, the corporation itself. In selecting and employing them, the municipality merely performs a political or governmental function; the duties entrusted to them did not relate to the exercise of corporate powers, and hence they are the agents or servants of the public at large. Upon this principle it has uniformly been decided by the courts that municipal corporations are not liable for the negligence or wrongful acts of the officers of the police or health departments committed in the course of their ordinary employment. Unless the duties of the officers of the Fire Department are of a different complexion, and they are the servants of the municipality because they are engaged in performing one of its corporate functions, the same principle must extend immunity to the municipality for the negligent acts of these officers and their subordinates."

Under the Federal Tort Claims Act it does not matter whether the employee of the government is performing a governmental function or a non-governmental function, nor whether that employee is an elected officer or an appointee. It does not matter whether he is acting for the general welfare of the public or solely for the benefit of his employer, the United States. It does not matter whether or not the United States derives a special benefit from his acts.

The finespun and somewhat artificial theory upon which the historical immunity of municipal corporations from liability for negligence of firemen is based,

as outlined above, is part and parcel of the "governmental-non-governmental" and "sovereign-proprietary" quagmire to which reference was made in the *Indian Towing Company* case and which was specifically renounced by this Court. But if it is suggested that the immunity of municipalities should be carried into the Federal Tort Claims Act, contrary to the obvious intent of the Act, it should follow, as necessary corollaries, that if the reasons for such immunity do not exist, then the immunity does not exist, and that if the facts of the case at bar are analogous or parallel to facts under which even municipal corporations would be liable, then the "public firemen immunity" theory would not apply.

In the case at bar, the Forest Service employees were not firemen. Their employer, the United States, had a direct, private and pecuniary interest in the property which those employees were engaged to care for. The employees were hired, not for the general welfare of the public, but for the special benefit and advantage of their employer. The duties entrusted to those employees relate to the exercise of the Government's proprietary powers and functions.

A fuller discussion of these points follows.

1.032 The Forest Service Employees Were Not Firemen.

District Ranger Floe and his subordinates, of whom complaint is made, were caretakers of the Government lands involved. As such caretakers their duties were many and varied, and included carrying out of forestry practices, selling timber, observation and inspection of road construction and logging operations in timber be-

ing purchased from the United States, checking on hunters, fishermen and recreationists, giving information to the public and to persons interested in the district and its many features and activities, and, in general, acting as caretakers of the Government's land (R. 8). Their duties also required that they inspect and patrol the Government lands and other lands within the Forest Service Protective Area, to discover, abate and eliminate conditions thereon which constituted fire hazards, to watch for the outbreak of fire and when fire occurred within the area, to follow the Fire Suppression Plan previously established and to fight and use every reasonable effort to control and extinguish the fire (R. 9). The Government did not own, maintain or operate a fire department or fire fighting organization as such in this area, but, just as other owners and operators of timber and timberlands in the area, had men and equipment available to fight fires and knew where additional men and equipment to fight fires could readily and quickly be obtained.

When is a public employee a fireman? Were District Ranger Floe and his subordinates public firemen during the forty-day period from August 11 to September 20 when they did practically nothing to extinguish the fire? The fire was contained and controlled within the 1600-acre area of cut-over land where it smoldered during that forty-day period. Within that time the smoldering fire could have been completely extinguished had the Forest Service used sufficient men, equipment and water, all of which were available (R. 22). Instead, and in spite of the large and valuable timber stands imperiled by the smoldering fire, and in spite of dry and

fire hazardous weather conditions the Forest Service simply put the 1600-acre area on a patrol basis with but few men to watch it and had no men present during the night (R. 23). That was wanton and negligent indifference to a potentially dangerous situation, the consequences of which were foreseeable. Were the Forest Service employees acting as firemen during that forty-day period? Is such conduct the act of a public fireman and is it the type of conduct from which the Government should be immune from liability? Did those Forest Service employees have their firemen's hats on during that forty-day period; and whether they did or not, should it make a difference in this case?

The janitor or custodian of any public building or of any state or municipal liquor warehouse, or of a municipal car barn or of any other property owned by his employer should be alert to fire and fire hazardous conditions on the property in his custody. Is he, for that reason, a fireman? If fire breaks out in a waste basket and the custodian grabs the fire extinguisher and puts out the blaze (or fails to put it out) is he yet a fireman? If he stands around and does nothing but watch it burn is he a fireman? Does the fact that a fire extinguisher hangs on the wall make him a fireman or the establishment a fire department? It seems unreasonable to say that a caretaker is a fireman or public fireman simply because his duties include good housekeeping and normal attention to fire danger when it occurs.

1.033 The Forest Service Employees Were Engaged in a Proprietary Function of the Government.

The Government derived from the Forest Service employees a special benefit in its proprietary capacity.

The Government lands for which the Forest Service employees were caretakers and on which the fire hazardous conditions and practices complained of existed, were owned and operated by the Government for pecuniary gain and profit and the timber thereon was held, managed, operated and administered upon to be sold to private parties for cutting, for industrial and commercial purposes and for pecuniary gain and profit to the Government (R. 5-6).

1.034 The Forest Service Employees Were Not Charged with a Public Service but Rather to Protect the Interests of Their Employer.

The Forest Service employees were not hired to perform a public service for the general welfare of the whole area or community. They were employed to look after the property of their employer. All of their duties relate to the administration of Government timber alone, and not to the property of others. By statute, 30 Stat. 35, as amended 33 Stat. 628; 16 U.S.C. §551, Appendix A, *infra*, pp. 95-96, the Secretary of Agriculture is authorized to make provision for protection against destruction by fire of public forests and national forests—i.e., *Government timber*,—not private or non-Federal timber. We find no authority for him to provide or maintain firemen for the benefit of the public at large. In administering and protecting Government timber, Forest Service employees best accomplish that

purpose by cooperating with other timber operators in rendering and receiving reciprocal aid and by taking action for the mutual and common benefit. It is as conservator of Government property that the Forest Service undertakes to fight fire on lands other than its own. This is contemplated and authorized by 43 Stat. 653, as amended 43 Stat. 1127, 44 Stat. 242, 61 Stat. 449; 16 USC §565, Appendix A, *infra*, pp. 94, 95. Were it not the Forest Service which undertook to supervise fire fighting in this area it might have been Rayonier Incorporated, the petitioner herein, or some other private timber owner or some association of private timber owners. Such arrangements are authorized by the above statute and by Washington state statutes, Rem. Supp. 1949, §5817-1; RCW 76.04.410 and Rem. Rev. Stat. §5784; RCW 76.04.050, Appendix B, *infra*, pp. 112, 98-9. Private parties sometimes do perform those functions in the States of Washington and Oregon.

The Federal government owns a substantial majority of the timber and timberlands in the Pacific Northwest and a large part of the remainder of the nation's timber. Many of its holdings are adjacent to or checker-boarded with private timber and timberlands. The Forest Service and private timber operators operate in much the same fashion. Their respective employees have many and similar duties, only one of which is to be alert for fire and to act appropriately when fire occurs. Neither the Forest Service nor any private operator maintains or operates a fire department or fire fighting organization as such, but both have some men and equipment available to fight fires and know where additional men and equipment can readily and quickly

be obtained. Both have fire suppression plans designed to mobilize and put into action all necessary forces to combat the common enemy of fire. Fire burns with the same devastation whether it starts on one side of a section line or the other.

When viewed in this light, it is clear that the Forest Service employees were not engaged for the benefit of the public at large, but rather for the special and direct benefit of their employer, the United States. To protect the property of their employer they must fight fire not only on government lands but before it reaches government land. By the same token if the petitioner herein discovered fire on its own or adjacent lands it might well send its own men to fight the fire to prevent it from burning petitioner's timber. In such case petitioner would probably call upon the Forest Service to lend employees and equipment to help fight the fire, just as the Government, in the case at bar, called on petitioner and many others to lend men and equipment to fight these fires.

Municipal fire departments on the other hand, devote their full time to the job and they are maintained to protect any and all property and any and all persons within the municipality. Theirs may properly be characterized as a public service, or a service for the public at large. They are self-sufficient and fully equipped to handle their duties without asking for outside help. In that respect it is not inept to draw a parallel to a public health officer and any quarantine which he might impose on a whole community for the general welfare. But let it be noted here that under the numerous decisions of this and other courts, if that public health officer, as

a Federal employee, should undertake to render specific medical services to a patient and is negligent in performing those services, the Government would be liable. *United States v. Gray*, 199 F.2d 239 (10th Cir. 1952); *Costley v. United States*, 181 F.2d 723 (5th Cir. 1950); *Griggs v. United States*, 178 F.2d 1 (10th Cir. 1949).

1.04 "Public Function" or "General Welfare" Does Not Require Immunity.

The Court below justified its holding, in part, on the ground that "The control of conflagrations on forest lands is as much a public function as the fighting of shipboard fires or of pestilence in time of epidemics" (R. 83). That position has been overruled by *Indian Towing Company, Inc. v. United States*.

Let us assume, for purpose of argument, that the Forest Service does render fire fighting assistance for the benefit of the public at large or for the general welfare and that its activities are in the nature of a public function. That is no more for the general welfare and no more of a public function than the maintenance and operation of lighthouses by the Coast Guard. Lighthouses are aids to navigation for the benefit of one and all who may be upon the seas and are not there solely or primarily for the benefit of Government vessels.

United States v. Union Trust Company, 221 F.2d 62 (D.C. Cir. 1955), affirmed by *per curiam* decision, 350 U.S. 907 (1956), on authority of *Indian Towing Company, Inc. v. United States*, holds the United States liable for the negligent operation of an airport control tower by the Civil Aeronautics Administration of the United States. Operation of that control tower was for

the benefit of the public at large and for one and all users of the airfield.

In *United States v. Lawter*, 219 F.2d 559 (5th Cir. 1955) the Court of Appeals for the 5th Circuit held the United States liable for negligence of the Coast Guard in rendering rescue services to a person in a shipwreck. The Coast Guard's activities in rescue operations are certainly for the general welfare and are a public function.

The maintenance and operation of a national army is certainly a public function and for the welfare of the entire nation, yet the United States has repeatedly been held liable under the Federal Tort Claims Act, for negligence of members of the Armed Services while on active duty.* The need for exercise of due care by military personnel, even under emergent conditions, is certainly as great as in the activities of a fireman; yet the Government is liable for their negligence.

As a matter of fact the United States Post Office Department in handling the mail is certainly performing a public function and acting for the general welfare, and yet the negligence of the mail truck driver is the classic example cited as an instance for which the United States should be liable. As this Court pointed out in the *Indian Towing Company* case:

“ * * * it is hard to think of any governmental activity on the ‘operational level’, * * * which is

* *United States v. Praylou*, 208 F.2d 291 (4th Cir. 1953) operation of military aircraft; *O'Toole v. United States*, 206 F.2d 912 (3rd Cir. 1953) operation of military combat vehicle; *Smith v. United States*, 116 F. Supp. 801 (D.C. Dela. 1953) and *Air Transport Associates v. United States*, 221 F.2d 467 (9th Cir. 1955), operation of Air Force Bases; *Cerri v. United States*, 80 F.Supp. 831 (D.C. Cal. 1948), shooting of a civilian by an Army guard.

‘uniquely governmental’ in the sense that its kind has not at one time or another been, or could not conceivably be, privately performed.”

We can see no reasonable distinction in principle between activities of the kind above described and those of the Forest Service, and there is nothing in the Federal Tort Claims Act which justifies different treatment of negligence of those engaged in one line of work and the negligence of those engaged in another line of work.

For this reason also the old concept of immunity from liability for negligence of public firemen should be discarded as inapplicable under the Federal Tort Claims Act.

1.05 *Dalehite v. United States* Is Distinguishable on the Facts.

Dalehite v. United States is clearly distinguishable on the facts from the case at bar. As we understand the *Dalehite* facts from a reading of the opinions and briefs, the Coast Guard’s presence at the scene of the fire was not associated with or for the purpose of protecting Government property, but was for rendition of services for the general welfare. The property and ships involved were not owned by or subject to the control of the Government. The places where the ships were docked and loaded and caught fire were not under the supervision or jurisdiction of the Government. The Coast Guard did not assume and undertake exclusive supervision and control of the fire fighting, nor induce reliance, as did the Forest Service in the case at bar. On the contrary the fire prevention measures and the fire fighting activities complained of were under the supervision, direction and control of the local authorities.

The Coast Guard had no duty to participate, and hence there was no breach of duty which would support an action for negligence.

But had the Coast Guard undertaken to perform specific acts in rendering assistance or in rescuing persons or property, and conducted itself negligently in so doing, then we believe the Government would have been held liable, even as a volunteer, under the reasoning of *Indian Towing Company, Inc. v. United States*, and *United States v. Lawter*, 219 F.2d 559 (5th Cir., 1955) wherein the United States was held liable for rendering rescue services at sea by Coast Guard helicopter and negligently permitting the person being rescued to fall from the rescue line.

PART TWO

Question No. 3

2.00 The United States May Be Liable as a Volunteer.

The Court of Appeals in this case stated:

"In our opinion the *Dalehite* case compels the conclusion that the Government, when intervening in the prevention and control of forest fires, may not be said to assume the common law obligation of a volunteer." (R. 83)

That holding presents Question No. 3 *supra* p. 4 and also enters into Question No. 4.

The Amended Complaint alleges as follows (R. 13, 14):

"XIV.

"Upon being informed of the fires referred to in paragraph XII, District Ranger Floe and his subordinates immediately assumed, took and exercised exclusive supervision, direction and control of all

activities in connection with the fighting and suppression of the fires, and at all times thereafter, through and including the times referred to in this complaint, continued to and did assume, take and exercise exclusive supervision, direction and control of the fighting and suppression of all fires referred to in this complaint. Plaintiff, in common with other owners and operators of timber and timberlands in the areas referred to in this complaint, knew of the facts described in this paragraph and relied upon District Range Floe and his subordinates to continue to carry on said activities at all times referred to in this complaint."

Regardless of other bases upon which the Government may be liable, it undertook to act and assumed and exercised exclusive supervision, direction and control of the fighting and suppression of all fires referred to in the Complaint and induced reliance by petitioner.

Clearly, the holding of the Court of Appeals in this case that the Government is not subject to the common law obligation of a volunteer, is contrary to the holding of this Court in *Indian Towing Company, Inc. v. United States* and other decisions. In *Indian Towing* this Court, in commenting upon the activity of the Coast Guard in maintaining light houses, said:

" * * * it is hornbook tort law that one who undertakes to warn the public of danger and thereby induces reliance must perform his 'good samaritan' task in a careful manner." 350 U.S. 61, 100 L.Ed. Adv. p. 86,

and again

"The Coast Guard need not undertake the light-house service. But once it exercised its discretion to operate a light on Chandeleur Island and en-

gendered reliance on the guidance afforded by the light, it was obligated to use due care to make certain that the light was kept in good working order, and if the light did become extinguished, then the Coast Guard was further obligated to use due care to discover this fact and to repair the light or give warning that it was not functioning. If the Coast Guard failed in its duty and damage was thereby caused to petitioners, the United States is liable under the Tort Claims Act." 350 U.S. 61, 100 L.Ed. Adv. p. 89.

The holding of the Court of Appeals in this case was also in direct conflict with the decision of the Court of Appeals for the 5th Circuit in *United States v. Lawter*, 219 F.2d 559 (5th Cir. 1955). During an air-sea rescue operation conducted by the Coast Guard operating a helicopter, plaintiff's wife was drowned because a Coast Guardsman negligently failed to secure her to the lifting cable. Government held liable. The court said, p. 562:

" * * * For the uncontradicted evidence shows that the Coast Guard, pursuant to long established policy, affirmatively took over the rescue mission, excluding others therefrom, and thus not only placed the deceased in a worse position than when it took charge, but negligently brought about her death, and it is hornbook law that under such circumstances the law imposes an obligation upon everyone who attempts to do anything, even gratuitously, for another not to injure him by the negligent performance of that which he has undertaken. 38 Am. Jur., 'Negligence,' Sec. 17, p. 659."

For further discussion of the Government's duty as a volunteer, see this brief, *infra*, pp. 62-64.

PART THREE**Question No. 4**

3.00 The United States Is Liable Under the Tort Claims Act Because Under the Circumstances of This Case a Private Person Would be Liable Under the Statutes and Under the Common Law of the State of Washington.

3.01 Negligence Defined.

A defendant is negligent when his conduct falls below the standard established by law for the protection of others against unreasonable risk of harm. The elements of the cause of action for negligence are:⁹

(a) A duty to conform to a standard of conduct for the protection of others against unreasonable risks;

(b) Defendant's breach of that duty with respect to plaintiff's interests;

(c) Damage to plaintiff;

(d) Proximately caused by defendant's substandard conduct; and

(e) The absence of contributory negligence.

The question of damage is not at issue here. The question of proximate cause is at issue and is discussed in Part Five, Question No. 6, pp. 5, 6 herein, Contributory negligence is not involved.

Therefore, the following argument is devoted exclu-

⁹*Harvey v. Auto Interurban Co.*, 36 Wn.2d 809, 220 P.2d 890 (1950); *Pate v. General Electric Co.*, 43 Wn.2d 185, 260 P.2d 901 (1953), affirmed 44 Wn.2d 919, 269 P.2d 589 (1954). See also, Prosser on Torts, Hornbook Series, p. 175, §30 Elements of Cause of Action; 2 Restatement of the Law of Torts §§281, 282; 2 Restatement in the Courts, 1954 Supplement §§281, 282; 28 Am. Jur. 651 *et seq.*, Negligence §11 *et seq.*; 65 C.J.S. 325, *et seq.*, Negligence §2 *et seq.*

sively to the question of whether, under Washington law, in the fire hazardous, forested area of the Olympic Peninsula, one landowner has a duty to his neighboring landowners to conform his land and his conduct to the standards of Washington statutes and common law decisions and whether, failing to do so, he is liable to his neighbors for fire damage caused thereby.

Negligence is any conduct which falls below the standard established by law for the protection of others against an unreasonable risk. The standard of conduct that must be observed in order to avoid being negligent is the standard that would be observed by a reasonable man under like circumstances. The standard of conduct of a reasonable man may be established either by legislative enactment or by judicial decision.¹⁰

3.02 Washington Statutes Establishing Standards of Care.

To appreciate accurately the important bearing of Washington statutes on the issue of negligence, one must take into account that timber is the greatest natural resource of the State of Washington. The forest products industry is pre-eminent on the Olympic Peninsula of western Washington where the events giving rise to this action occurred. Private parties and both the state and federal governments own extensive timber and their respective holdings are intermingled one with the others. A reading of Chapter 76.04 of the Revised Code of Washington (many sections of which are set

¹⁰Prosser on Torts, p. 264, *et seq.*, §39 Violations of Statute; 2 Restatement of the Law of Torts §§285, 286; 2 Restatement in the Courts, 1954 Supplement §§285, 286; 38 Am. Jur. 827 *et seq.*, Negligence §158 *et seq.*; 65 C.J.S. 413, *et seq.*, Negligence §19 *et seq.*

forth in Appendix B, pp. 98, 99-113) will make clear the legislature's long-standing and grave concern for the protection of the forests of Washington, especially forests on the Olympic Peninsula, from the risk of fire. Some of these statutes are criminal statutes; others establish standard procedures for cooperation in protecting intermingled private, state and federal timberlands. They prescribe what the legislature of this state regards as the proper standard of care for the conduct of persons and for the condition of land in order to minimize the risk of timber loss through forest fire.

Violation of the standard of care established by statute, either by doing a prohibited act or by failing to do required acts, makes the defendant liable for the invasion of the interests of the plaintiff if: (a) the plaintiff is one of a class of persons whom the statute was intended to protect; (b) the harm which has occurred is of the type which the statute is intended to prevent; and (c) if all of the other elements of tort are present.¹¹

Discarger v. City of Seattle, 25 Wn.2d 306, 171 P.2d 205 (1946);

Cook v. Seidenverg, 36 Wn.2d 256, 217 P.2d 799 (1950);

Erickson v. Kongsli, 40 Wn.2d 79, 240 P.2d 1209 (1952).

¹¹For a general discussion see: Prosser on Torts, Hornbook Series, §39, p. 264; 2 Restatement of the Law of Torts, §§285, 286; 2 Restatement in the Courts, 1954 Supplement, §§285, 286; 38 Am. Jur. 827, *et seq.*, Negligence §158 *et seq.*; 65 C.J.S. 413, *et seq.*, Negligence §19, *et seq.*; Thayer, Public Wrong and Private Action, 1914, 27 Harv. L. Rev. 317; Lowndes, Civil Liability Created by Criminal Legislation, 1932, 16 Minn. L. Rev. 361.

The Ninth Circuit Court of Appeals has recognized that violation of a fire prevention statute may be the basis for civil liability even though criminal penalties attach to the violation. In *Spokane International Railway Co. v. United States*, 72 F.2d 440 (9th Cir. 1934), the defendant railroad was held liable for damages resulting from fire caused by its passing train. The court said at page 442:

“(4-6) We come then to the effect of the Idaho statute which required defendant to keep its right of way ‘clear and free from all combustible and inflammable material, matter or substances.’ during the closed season from June 1st to September 1st. This criminal statute established a standard of care, failure in the observance of which would subject defendant to civil liability if such failure caused or contributed to the damage of another. If the fire originated on defendant’s right of way in inflammable material, which in violation of the statute had been allowed to accumulate there, it would be immaterial whether a spark from defendant’s engine or the act of a third person from without defendant’s right of way had caused the fire. *Curoe v. Spokane & I.E.R. Co.*, 32 Idaho 643, 186 P. 1101, 37 A.L.R. 923 (1920). On the other hand, even though the fire was set by a spark from defendant’s engine, if it ignited material lying outside of the right of way, negligence in failing to maintain the right of way in accordance with the statute would be immaterial unless such failure contributed to the spread of the fire.”

Violations of statutes intended to protect and preserve Washington timberlands repeatedly have been held proper grounds for civil relief.

In *Kuehn v. Dix*, 42 Wash. 532, 85 Pac. 43 (1906), the court held that a breach of the standard of care established in Rem. Rev. Stat. §5647; RCW 4.24.040 (Appendix B, p. 98) constituted actionable negligence.

In *Wood & Iverson, Inc. v. Northwest Lumber Co.*, 138 Wash. 203, 244 Pac. 712 (1926), the court referred to the following statutes as being evidential of the standard of conduct demanded of people operating timberlands: Rem. Rev. Stat. §5647; RCW 4.24.040 (Appendix B, p. 98), which specifically authorizes civil action for violation of certain forest protection statutes having criminal sanctions; Am. Rem. Supp. 1945 §5792-1; RCW 76.04.230 (Appendix B, p. 113) which establishes procedures for disposing of combustibles on cut-over land and the issuance of certificates of clearance indicating compliance with the standards established by the legislature for the condition of land in forested areas; and Am. Rem. Supp. §5807; RCW 76.04.370 (Appendix B, p. 110) which imposes on landowners the duty to abate fire hazardous combustibles on their lands. The duty and standard of care prescribed by this statute was breached by the Government in the case at bar.

Although the foregoing statutes were referred to in *Wood & Iverson*, the court based its finding of negligence on the ground that defendant had breached the standard of conduct established in Rem. Rev. Stat. §5789; RCW 76.04.180 (Appendix B, p. 99) which establishes a procedure and a standard of care and conduct in situations where slash burning is undertaken. The breach of the said standard justified a reversal of

the trial court and judgment for the plaintiff on the issue of negligence.

In *Mensik v. Cascade Timber Co.*, 144 Wash. 528, 258 Pac. 323 (1927) and in *Conrad v. Cascade Timber Co.*, 166 Wash. 369, 7 P.2d 19 (1932), the defendant's breach of Rem. Rev. Stat. §5789 was the basis for the court's holding that the defendant's conduct had been substandard and therefore negligent. In the *Mensik* case the court referred also to the standards of conduct set forth in §5807 relied upon by petitioner herein.

Although not all of the statutes referred to in the above cases are ones specially relied upon herein, all are of the same kind, class and nature. The court's reliance on them clearly demonstrates that a breach of the statutory standard of care and conduct constitutes negligence.

The statutes particularly applicable in determining that the Government's conduct was negligent in the case at bar are the following:

Rem. Rev. Stat. §5818; RCW 76.04.450, reads as follows:

"All forests and timber upon all lands in the state of Washington lying west of a line one mile west of the eastern boundary of range ten west of the Willamette Meridian and north of the north boundary line of Grays Harbor county, shall be protected and preserved from the fire hazard to which they are or may be exposed by reason of the unusual quantity of fallen timber upon such lands. It shall therefore be unlawful for any person, firm, company or corporation, their officers, agents or employees, to do or commit any act which shall ex-

pose any of the forests or timber upon such lands to the hazard of fire."

All of the lands described in the complaint (R. 11, 4, 5, 6, 34, 35) and involved in the case at bar are within the fire hazardous Olympic Peninsula area described in that statute.

The Government employees guilty of the negligent conduct complained of were uniquely aware of the unusual fire hazards mentioned in the statute because it includes the area of their activity and for which they had responsibilities under the protective agreement (R. 6-7), and they were aware of the extremely dry condition of said land (R. 10); and of the extremely fire hazardous condition and practices of the railroad on Government-owned land within the area (R. 11-12).

Am. Rem. Supp. §5807; RCW 76.04.370 (Appendix B, p. 110) reads in part as follows:

"Any land in the state covered wholly or in part by inflammable debris created by logging or other forest operations, land clearing, or right-of-way clearing and which by reason of such condition is likely to further the spread of fire and thereby endanger life or property, shall constitute a fire hazard, and the owner thereof and the person responsible for its existence shall abate such hazard.

* * * "

The complaint alleges that Government-owned land in the area where the fire started was covered by inflammable debris and that by reason of its condition it was likely to further the spread of fire and thereby endanger the neighboring timberlands and other properties (R. 11, 12, 13, 26).

Rem. Rev. Stat. §2523; RCW 76.04.220 (Appendix B, p. 98) reads as follows:

“Every person who shall wilfully or negligently set, or fail to carefully guard or extinguish any fire, whether on his own land or the land of another, whereby the timber or property of another shall be endangered, or who shall fail to respond to any lawful summons to aid in guarding or extinguishing any fire, shall be guilty of a misdemeanor.”

The complaint alleges that the Government's employees negligently failed to extinguish the fire that started on Government owned land on August 6, 1951, and that this negligent failure continued for approximately 45 days. During this period there were ample labor, equipment, roads and water available to extinguish the fire but it was permitted to smolder and burn to the great risk of petitioner's timberlands and other properties (R. 12, 14-24).

Am. Rem. Supp. 1945 § 5806; RCW 76.04.380 (Appendix B, p. 108) reads in part as follows:

“ * * * The owner * * * of land, on which a fire exists, or from which it may have spread, notwithstanding the origin or subsequent spread thereof on his own or other lands, shall make every reasonable effort to control and extinguish such fire immediately after receiving written notice to do so from the supervisor, or a warden or ranger;
* * * ”

The Government had actual and immediate notice (R. 13) of the fire on August 6, 1951, and undertook to act promptly (R. 14). Formal written notice would have been a vain and useless act. The Government con-

tended below that the foregoing statute pertains only to collection by the state from the landowner of the cost of fighting fire. The contention is erroneous. The statute expressly imposes on the owner of land the duty to make every reasonable effort to control and extinguish the fire on his land and to pursue and fight the fire on other lands. That requirement is to protect neighboring lands. The Government breached this standard of conduct (R. 12. 14-24). The statute then imposes financial responsibility on the owner if the state is required to do the owner's work.

3.021 Erroneous Government Contentions re Statutes.

Government counsel, in their argument to the court below, confused petitioner's reliance upon the foregoing statutes with "absolute liability without fault." Petitioner does not contend that the combustible material on the Government land was inherently dangerous or that the Government is absolutely liable without fault by virtue of its breach of the statutes mentioned herein. Petitioner's case is one of liability *with* fault based upon the Government's substandard conduct. There is vital distinction between these two concepts of negligence which is discussed fully as Part Four hereof, covering Question 5, at pp. 73-84, *infra*.

The Government has made three other contentions with respect to statutes which must be anticipated. The first contention is that Rem. Rev. Stat. §5818; RCW 76.04.450, cannot render the Government liable because the violation of this statute requires the person to do an act and that under the pleadings the Government did no act by way of permitting the accumulation of

slash and debris. When Rem. Rev. Stat. §5818; RCW 76.04.450 says " * * * It shall be unlawful for any person * * * to do or commit any act which shall expose any of the forests or timber upon such lands to the hazards of fire.", the phrase "do any act" is plainly synonymous with the phrase "to be guilty of any conduct" and must also include omissions.

The second anticipated contention is that these statutes drastically change the common law, are extremely harsh and are of a criminal nature. The standards of care established by the Washington statutes do not differ materially from the standards of care established by common law. In the following cases landowners were held liable under common law for acts the same as or similar to those described in the complaint:

Prince v. Chehalis Sav. & Loan Assn., 186 Wash. 372, 58 P.2d 290 (1936);

Collins v. George, 102 Va. 509, 46 S.E. 684 (1904);

Riley v. Standard Oil Co. of Indiana, 214 Wis. 15, 252 N.W. 183 (1934);

Eisenkramer v. Eck, 162 Ark. 501, 258 S.W. 368 (1924);

Keyser Canning Co. v. Klots Throwing Co., 94 W.Va. 346, 118 S.E. 521 (1923).

Moreover, there are specific holdings by the Washington Supreme Court that a number of these statutes are merely declaratory of the common law of this state.

For example, in *Mensik v. Cascade Timber Co.*, 144 Wash. 528, 258 Pac. 323 (1927), it was contended that the standard of conduct prescribed by Rem. Rev. Stat.

§5789, Appendix B, p. 99, requiring certain precautions preparatory to slash burning operations, was unfair and unlawful because it did not harmonize with the common law. The court disposed of the contention as follows at 258 Pac. 328:

"It is also claimed that this instruction imposed upon appellant an unlimited duty to guard its fires, irrespective of whether or not the spread was due to an intervening cause. But the instruction also charges that the duty is imposed upon appellant to take such care as a careful and prudent man would do. That is the exact requirement of the statute (§5789, *supra*) and therefore cannot be successfully assailed. See, also, *Sandberg v. Cavanaugh Timber Co.*, 95 Wash. 556, 164 Pac. 200."

The *Sandberg* case, cited by the court and quoted at length at pp. 59-60 herein, indicates clearly that under the early English common law the standard of care required to prevent fire escaping from one's own land to neighboring lands was more harsh than it is now under the law of Washington.

Speaking of Rem. Rev. Stat. §5647; RCW 4.24.040, the Supreme Court of Washington on three occasions has said that it is merely declaratory of the general common law tort rule requiring prudence in handling fire in the woods. *Jordan v. Welsh*, 61 Wash. 569, 112 Pac. 656 (1911); *Walters v. Mason County Logging Co.*, 139 Wash. 265, 246 Pac. 749 (1926). In *Pettigrew v. McCoy-Loggie Timber Co.*, 138 Wash. 619, 245 Pac. 22 (1926), the court said at 245 Pac. 23:

" * * * we feel satisfied that the provision of Section 3 of the Fire Act of 1877 was purely and

accurately declaratory of a settled principle of the common law * * *."

Thirdly, Government counsel say it would be unreasonable to impose responsibility for the condition of the land in perpetuity. The answer to that is two-fold. First, the timber which the statutes are designed to protect is a resource which the legislature wishes to maintain and protect in perpetuity. Second, there are statutory procedures by which a property owner can obtain a certificate of clearance, and thus relieve himself of the responsibility.

3.03 Liability Under Washington Common Law and Decisions.

Under Washington decisions a reasonable District Ranger with Mr. Floe's experience and skill would be required to exercise those qualities of attention, knowledge, skill, intelligence and judgment which society in a timber growing community of western Washington requires of foresters having his special skills and experience. He is required to perceive the conditions, circumstances and activities which have fire significance in the woods and to apply prudent judgment to what he perceives.

3.031 Liability as Landowner.

Under the decisions of the Supreme Court of the State of Washington a land owner, after discovery of fire on his premises, must exercise reasonable care to prevent its spread to adjoining land and he will be liable for damages caused through his failure to exercise such reasonable care. In the case of *Sandberg v.*

Cavanaugh Timber Co., 95 Wash. 556, 164 Pac. 200 (1917), the court used the following language, commencing at 164 Pac. 201:¹²

"The authorities convince us that there may be negligence, such as to render the owner of premises liable to his neighbor in his failure to use due diligence in preventing the spread of a fire originating upon his own land, though it so originate without any act or fault of his own. The common law seems to have rendered an owner of premises on which fire starts, regardless of the manner of its starting, absolutely liable for damage which his neighbor suffers therefrom; but the harshness of this doctrine has been much modified in both England and this country in recent times. In the text in 11 R.C.L. 940, the learned editors state the present-day rule as follows:

"The general rule in this country, as in England, is now well settled that when a private owner of property sets out fire on his own premises for a lawful purpose, or when a fire accidentally starts thereon, he is not, in the absence of a statute to the contrary, liable for damage caused by its communication to the property of another, unless it started through his negligence, or he failed to use ordinary skill and care in controlling or extinguishing it."

"In Bishop's Non-Contract Law, at §833, that learned author says:

"Since fire, one of the most beneficent servants of man, does not from its own nature im-

¹²To the same effect is *McCann v. Chicago, Milwaukee & Puget Sound Railway Company*, 91 Wash. 626, 158 Pac. 243 (1916), and *Jordan v. Spokane, Portland & Seattle Railway Company*, 109 Wash. 476, 186 Pac. 875 (1920). See also cases from other jurisdictions which are included in the following annotations: 42 A.L.R. 821, 111 A.L.R. 1149 and 18 A.L.R.2d 1097.

peril surrounding persons and objects, the careful setting and keeping of it in one's dwelling-house, shop, field, or elsewhere, for a useful purpose, creates no liability to another injured by its spreading, through some accident not reasonably to be anticipated. But a fire set or looked after negligently, if by reason of such negligence it communicates to a neighbor's property and destroys it, will give the neighbor an action for the damages.'

"In this test it will be observed that it is at least inferentially stated that there may be negligence rendering an owner of premises liable in such cases, regardless of how the fire starts upon his premises. The reports furnish but few instances of decisions being rendered wherein there is considered the question of the measure of the duty of a person, on whose premises a fire is started by some agency for which he is not responsible, to prevent its spread to his neighbor's property. The decisions touching this exact question, however, seem to be in harmony in holding that there is a measure of responsibility on the part of an owner, growing out of such a situation, which requires him to use reasonable effort to prevent the spread of a fire occurring upon his premises, apart from his own act or neglect attending the starting of the fire, which may render him liable to his neighbor as for negligence."

This statement of common law was confirmed in *Lehman v. Maryott & Spencer Logging Co.*, 108 Wash. 319, 184 Pac. 323 (1919) where the court said at 184 Pac. 324:

"The first question is whether the appellant was negligent in looking after the fire after it had been

started [on appellant's lands] * * *. The rule in such cases is that one starting a fire on his own land is required to exercise reasonable care to prevent it from spreading to a neighbor's land. If in this regard he acts as a reasonably prudent person would have acted under like or similar circumstances, he is not guilty of negligence. On the other hand, if he fails to so act, he has not exercised that degree of care which the law requires of him and would be chargeable with negligence.* * * "

In holding for defendant, the court found that there was no negligence.

Walters v. Mason County Logging Company, 139 Wash. 265, 246 Pac. 749 (1926), relied upon by the Government in the District Court, rules in favor of a landowner who exercised ordinary care and was not negligent, the loss being due to an intervening cause not foreseeable or controllable. Contrary to the Government's contentions below, the *Walters* case supports petitioner's theory of duty. The court there said at 246 Pac. 751:

"In the present case, the origin of the fire was known to be upon respondent's premises. The duty of respondent after notice of the fire burning upon its property was the same as if the fire had been set out by respondent itself. In other words, its duty under the law announced in the *Jordan* case, *supra*, was to use all reasonable efforts to prevent the spread of the fire to the property of others. That is also a statutory duty. Rem. Comp. Stat., §5647 (P.C. §9131-41); *Burnett v. Newcomb*, 126 Wash. 192, 217 Pac. 1017." [RCW 4.24.040.]

One who has a duty to prevent or extinguish a fire

originating on his lands must act as a prudent and careful person would do under like circumstances. In *Michigan Millers Mutual Fire Insurance Company v. Oregon-Washington Railroad and Navigation Company, et al*, 32 Wn.2d 256, 201 P.2d 207 (1948), the Washington Supreme Court, in holding a railroad liable for a clearing fire started on its right of way, said at 201 Pac. 210:

“The railroads did not have sufficient equipment, nor a sufficient crew, and did not display the proper care and caution in ‘handling and controlling such a destructive agency.’ Under the circumstances, such lack of care constituted negligence.”

See also *Wood & Iverson, Inc., v. Northwest Lumber Company*, 138 Wash. 203, 244 Pac. 712 (1926), confirmed on rehearing, 141 Wash. 534, 252 Pac. 98 (1927).

After the discovery of fire on the Government land on August 6, District Ranger Floe failed to exercise reasonable care to prevent its spread to adjoining lands because, as alleged in the complaint, he failed to use sufficient men and equipment at all stages of the fire (R. 13-15, 17-19, 21-29).

3.032 Liability as Volunteer.

One who volunteers to render services which he should recognize as possibly affecting the safety of another's property is liable in tort if he fails to exercise reasonable care in the performance of the services he undertakes. One whose property may be affected by said services is entitled to assume that the volunteer will perform the services in a reasonably prudent manner. He may rely justifiably upon the volunteer's pru-

dent performance of the services and accordingly may refrain from taking action for his own protection. If the volunteer fails to exercise ordinary care, he will be liable to said property owner.¹³

Clearly, the holding of the Court of Appeals in this case that the Government is not subject to the common law obligations of a volunteer, is contrary to the holding of this court in *Indian Towing Company, Inc., v. United States*, 350 U.S. 61 (1955) and other decisions.¹⁴

¹³See 2 Restatement of the Law of Torts, §§497, 321, 323 and 325. See also Prosser on Torts, where that authority, at page 183, states the rule as follows:

"If the defendant's conduct threatens harm, which a reasonable man would foresee, to A, then he is negligent toward A, and by the great weight of authority he is liable for all damage resulting directly to A, even if the damage itself was not to be anticipated."

¹⁴*Lacey v. United States*, 98 F.Supp. 219 (D.C. Mass. 1951) where the Court said at p. 220: " * * * It is true that, while the common law imposes no duty to rescue, it does impose on the Good Samaritan the duty to act with due care *once he has undertaken rescue operations* * * * " (Italics are the Court's). Judgment was for the United States only because it was held that the Coast Guard had not undertaken the rescue out of which the action arose.

Brewer v. United States, 108 F.Supp. 239 (D.C. Ga. 1952), where the United States was held liable when it undertook construction, maintenance and operation of a civilian swimming pool.

Costley v. United States, 181 F.2d 723 (5th Cir. 1950), and *United States v. Gray*, 199 F.2d 239 (10th Cir. 1952) are two cases where the United States, notwithstanding the fact that it had no duty to care for the patient at all, undertook to treat the patient and, having done so negligently, was held liable for the resultant injuries.

United States v. Union Trust Co., 221 F.2d 62 (D.C. Cir. 1955) where the Court said at p. 74: " * * * It follows that, when the United States entered the business of operating a civil airport and an air traffic control tower in connection therewith, it assumed a role which might be and was assumed by private interests. Hence under 28 U.S.C. §§1346(b) and 2674, the Government is liable for the negligent acts or omissions of its control tower operators in the performance of their functions and duties * * * ." This Court granted certiorari and affirmed the judgment of the Court of Appeals against the United States 350 U.S. 907 (1956), citing *Indian Towing Company, Inc. v. United States*, 350 U.S. 61 (1955).

3.033 Liability Under Contract.

The Government had a duty under its contract with the State of Washington to fight and extinguish this fire.¹⁵ It is immaterial whether petitioner could sue the Government under the contract; the Government's duty to use ordinary care extends to petitioner. 65 C.J.S. 349, relied upon below by the Government, in fact, supports Rayonier's position, as follows:

“ * * * there are two distinct principles which may be invoked to fix liability for an injury from negligence in the performance of a contract obligation. The law may impose duties additional to those specified in a contract or independent of it, and one may owe two distinct duties in respect of the same thing, one of a special character to a particular individual, growing out of special relation to him, and another of a general character to those who would necessarily be exposed to risks or danger or loss through the negligent discharge of such duty. Privity of contract is not necessary where the duty which was breached, although connected with the subject matter of a contract, was not created by contract, as in a case where one who has been employed to perform certain work is guilty of such negligence in connection with the performance thereof as to cause injury to a person other than his employer, or where the thing dealt with is inherently dangerous; a *fortiori*, privity of contract is not necessary where there is no contract relation.

“The governing rule is that, where a person undertakes to do an act or discharge a duty by which the conduct of another may be properly regulated and governed, he is bound to perform it in such a

¹⁵Examine paragraph VI of amended complaint (R. 6-7).

manner that those who are rightfully led to a course of conduct or action on the faith that the act or duty will be duly and properly performed shall not suffer loss or injury by reason of negligent failure so to perform it, and the nature and extent of the duty assumed by a person are factual matters to be established by proof of his actual conduct; and liability for negligence in the breach of this duty is in no way dependent on the existence of any privity of contract between the person guilty of the negligence, and the person suffering injury as a result thereof."

This rule has been approved by the Ninth Circuit Court of Appeals and by the Supreme Court of the State of Washington.¹⁶

A private individual could have been party to a contract with the State of Washington similar to the above-mentioned contract to which the Forest Service was a party. Rem. Rev. Stat. §5784; RCW 76.04.050, requires that the State Supervisor of Forestry "shall * * * cooperate in * * * forest fire fighting and patrol * * * with * * * the United States * * * and individuals within the state of Washington * * *." It is under authority of

¹⁶*Western Auto Supply Agency v. Phelan*, 104 F.2d 85 (9th Cir. 1939); and *Sheridan v. Aetna Casualty, etc., Co.*, 3 Wn.2d 423, 100 P.2d 1024 (1940). See also Prosser on Torts, page 206, §33, where it is said:

"Liability to Third Persons"

"The obligation of a contract runs only to the parties designated by the contract. If the defendant assumes a contract duty toward A, there is no logical basis upon which he may be compelled to perform that duty for B, unless the contract has been entered into expressly for the benefit of B, or A should happen to have assigned his rights. But by entering into the contract with A, the defendant may place himself in such a relation toward B that the law will impose upon him an obligation to act in such a way that B will not be injured. The action is not upon the contract, since B is a stranger to it; but the existence of the contract does not negative the responsibility of the defendant when he enters upon a course of conduct which may affect the interest of others."

this statute that the State made the contract with the Forest Service. The Forest Service also is authorized to enter into such contracts, 16 U.S.C. §565.

The Government's duty to observe a proper standard of conduct and to keep its lands in a safe condition was breached in each of the above respects, that is, under the statutes and under common law as a landowner, as a volunteer, and as a contractor upon whom plaintiff was entitled to rely. A breach of any one of those duties would be adequate to support this action. Even if this Court were to hold that any one or more of those duties did not exist, there would still be a claim if any one of them did exist and was breached.

The numerous breaches summarized in the complaint at R. 26-29 include knowingly permitting substandard and fire hazardous conditions and practices on the Government's land, failure to exercise ordinary care in preventing, containing and controlling the fire in each of its preliminary stages and failure to pursue diligently and to extinguish the fire, all with full knowledge of the dangerous conditions and risks involved and having full means at the disposal of the Government's employees to eliminate or minimize the risks. Petitioner was damaged (R. 29-33), and such damage was proximately caused by breach of the Government's duty to petitioner (R. 29).

Clearly, if it were a private person who owned the land and whose employees were guilty of the acts and omissions described in the complaint, that person would be liable to petitioner under the allegations of the complaint and under the law and statutes of the State of Washington. To date, we do not understand Govern-

ment counsel to contend otherwise. The District Judge, especially familiar with the law of Washington where for many years he was a practicing attorney, in his remarks from the bench stated that in his opinion there would be a duty on the Government and a proper claim stated except for the Judge's interpretation of *Dalehite v. United States* (R. 41). In the meantime, *Indian Towing* has supervened to affect the interpretation of *Dalehite*.

PART FOUR

Question No. 5

4.00 Construction of Washington Statutes as Imposing Liability without Fault—Applicability.

The Court of Appeals, in passing upon one important aspect of the case at bar, said at 225 F.2d, 647 (R. 86, 87):

“Appellant cites RCW §§76.04.370 and 76.04.450, and §§5807 and 5818, Rem. Rev. Stats.* These provisions purport to impose liability on a private landowner for failing to take steps to remedy substandard conditions on his property but have no application here. Secs. 5807 and 5818 impose liability without fault. No defense based on the reasonableness of the conduct proscribed is provided. The *Dalehite* case, 346 U.S. at pages 44, 45, holds that the Federal Tort Claims Act does not waive the immunity of the United States in such actions.”¹⁷

¹⁷The form in which three Washington statutes are set out in footnotes 6 and 8 to the Court of Appeals opinion (R. 86-89) are not the form of those statutes in effect in 1951. The applicable forms are set forth in Appendix B hereto as follows: Am. Rem. Supp. §5807, RCW 76.04.370; Laws of 1951, Ch. 235, §1—Appendix B, p. 110; Rem. Rev. Stat. §5818; R.C.W. 76.04.450; Laws of 1921, Ch. 67, §1—Appendix

That holding was in error and conflicts with the decision of the Court of Appeals for the Fourth Circuit in *United States v. Praylou*, 208 F.2d 291 (1953), *Certiorari* denied, 347 U.S. 934 (1954). It presents Question No. 5, *supra*, p. 4.

The two Washington statutes involved are as follows: RCW 76.04.370; Am. Rem. Supp. §5807 (Appendix B, p. 110, *infra*) reads, in part:

"Any land in the state covered wholly or in part by inflammable debris created by logging or other forest operations, land clearing, or right-of-way clearing and which by reason of such condition is likely to further the spread of fire and thereby endanger life or property, shall constitute a fire hazard, and the owner thereof and the person responsible for its existence shall abate such hazard.

* * *

It then provides for recovery by the State of any expense in fighting the fire if the party charged by statute with the duty of abating the same, fails to act.

Rem. Rev. Stat. §5818, RCW 76.04.450 reads as follows:

"All forests and timber upon all lands in the State of Washington, lying west of a line one mile west of the eastern boundary of range ten west of the Willamette Meridian and north of the north boundary line of Grays Harbor county, shall be protected and preserved from the fire hazard to

B, p. 112; Am. Rem. Supp. 1945, §5806; R.C.W. 76.01.380, Laws of 1951, Ch. 58, §9—Appendix B, p. 108.

§5806 in its correct version contains a material difference from the older 1917 form set out in the opinion, in that it imposes a standard of care for "the owner, operator or person in possession of land, on which a fire exists, or from which it may have spread, notwithstanding the origin or subsequent spread thereof on his own or other lands." The quoted portion was not contained in the older version.

which they are or may be exposed by reason of the unusual quantity of fallen timber upon such lands. It shall therefore be unlawful for any person, firm, company or corporation, their officers, agents, or employees, to do or commit any act which shall expose any of the forests or timber upon such lands to the hazard of fire."

(All of the land described in paragraph XI of the Amended Complaint (R. 11) is located within the area described in the foregoing statute.)

The Washington Supreme Court has, in effect, held that RCW 76.04.370 does not establish liability without fault. In *State of Washington v. Canyon Lumber Corporation*, 46 Wn.2d 701, 284 P.2d 316 (1955) the court held that statute constitutional. In its discussion the court said of this statute, page 321:

"No one is held responsible under the statute unless they create the hazard, or suffer it to remain upon their property."

In the Fourth Circuit case of *United States v. Praylou, supra*, the Government was held liable under the Federal Tort Claims Act for damages suffered when a Government owned and operated plane fell and exploded on the plaintiff's premises in South Carolina. The South Carolina statute provides in part as follows:

"The owner of every aircraft which is operated over the land or waters of this state is absolutely liable for injuries to persons or property on the land or water beneath caused by ascent, descent or flight of the aircraft or the dropping or falling of any object therefrom, whether such owner was negligent or not, unless the injury is caused in whole or in part by the negligence of the person

injured or of the owner or bailee of the property injured * * *."

The Government contended that it may not be held liable under that statute because it imposes absolute liability and because under the Tort Claims Act the Government is liable only where there is a negligent or wrongful act or omission of an employee of the Government. The Fourth Circuit Court of Appeals held that the Government is liable under this statute even though absolute liability is created thereby.

The decision of the Court of Appeals in the case at bar and that of the Court of Appeals for the 4th Circuit in the *Praylou* case are obviously in conflict and should be reconciled. In our judgment it is immaterial under the Federal Tort Claims Act whether the statutes of a given state impose liability which is absolute or not because it is the intent and purpose of the act to make the United States amenable to liability in exactly the same fashion and under the same circumstances as private individuals would be liable in the state in which the negligence occurs.

If a statute can validly impose liability upon an individual then it should likewise impose liability upon the Government for the acts of its employees in violation of the statute. In the *Praylou* case the court said:

"The weakness of the position of the Government is that it overlooks the fact that the effect of the South Carolina statute is to make the infliction of injury or damages by the operation of an airplane of itself a wrongful act giving rise to liability. * * *

" * * *

"It should be noted that the liability asserted here against the government is not one arising out of the mere possession of property, but one created by law for the invasion of personal and property rights. It is clearly within the power of the state to enact legislation imposing such liability, and it is equally clear that any such invasion of rights, whether intentional or not, can be made a wrongful act on the part of the one guilty of the invasion, and is made such by a statute imposing liability therefor. As said in the A.L.I. Restatement of Torts, p. 16, the word 'tortious,' which means wrongful, 'is appropriate to describe not only an act which is intended to cause an invasion of an interest legally protected against intentional invasion, or conduct which is negligent as creating an unreasonable risk of invasion of such an interest, but also conduct which is carried on at the risk that the actor shall be subject to liability for harm caused thereby, although no such harm is intended and the harm cannot be prevented by any precautions or care which it is practicable to require.'"

* * *

" * * *

"It is generally impossible to establish with any certainty the cause of the falling of an airplane. To apply the *res ipsa loquitur* rule, as we did in the *D'Anna* case, *supra*, is, as stated, not very different from applying the rule of absolute liability; and for the law of a state to prescribe the latter instead of the former does not seem to us to remove the case from the liability which the government undertook to assume under the Tort Claims Act. On the contrary, it seems to us that it would be absolutely absurd to hold that the government is liable under the Tort Claims Act for the act of

an employee who crashes into a house with a truck but not liable if he crashes into it with an airplane, and this on the theory that there is absolute liability under state law in the latter case but not in the former. The man on the street would never understand any such distinction; and in the minds of thoughtful lawyers it would do little credit to the law.* * *

In the case at bar the liability asserted against the Government is not one arising out of the mere ownership of property but one arising out of the creation or tolerance of a condition and use of that property in such manner as to cause an invasion of the personal and property rights of others, including petitioner. The slash and debris on the land where the fire started was not in itself inherently dangerous. It took something more to make that debris spring into flame and cause the damage complained of. But the Forest Service employees knew that the inflammable material would burst into flame if sparks were introduced into it; knew that the railroad equipment was defective and was being operated in a negligent manner apt to throw sparks into the debris; knew that fire would imperil and might spread to the forests in the vicinity; and had the power to prevent both the fire-hazardous conditions and fire-hazardous practices. It is clearly within the power of the state to enact legislation designed to prevent that patently dangerous and negligent situation.

PART FIVE

Question No. 6

5.00 Construction of Amended Complaint

The Court of Appeals has so misconstrued the amended complaint as to call for an exercise of this Court's powers of supervision. Vital questions as to relationships and duties of the parties and of proximate cause hinge on the correct and fair interpretation of the allegations of the amended complaint. Unless the ruling of the Court below is corrected, petitioner's cause will be materially and adversely affected not only on two of the more important matters involved but also on related collateral issues.

5.01 General Rules of Construction

All of the well-pleaded allegations of fact in the amended complaint are deemed admitted by respondent's motion to dismiss.¹⁷ On a motion to dismiss which challenges the sufficiency of the amended complaint to state a claim upon which relief can be granted, the amended complaint must be construed in a light most favorable to plaintiff, with all doubts resolved in plaintiff's favor and all allegations accepted as true.¹⁸ We

¹⁷Rules 12(b) and 56 of the Federal Rules of Civil Procedure. *Ledbetter v. Farmers Bank & Trust Co.*, 142 F.2d 147 (4th Cir. 1944); certiorari denied 323 U.S. 719, 89 L.Ed. 578, 65 S.Ct. 48; rehearing denied 323 U.S. 813, 89 L.Ed. 647, 65 S.Ct. 112; rehearing denied 324 U.S. 886, 89 L.Ed. 1435, 65 S.Ct. 682; motion denied 325 U.S. 837, 89 L.Ed. 1963, 65 S.Ct. 1189.

¹⁸*Meredith v. John Deere Plow Co. of Moline*, 89 F.Supp. 787 (S.D. Iowa 1950); affirmed 185 F.2d 481 (8th Cir. 1950); certiorari denied 341 U.S. 936, 95 L.Ed. 1364, 71 S.Ct. 856. See also *Forstmann Woolen Co. v. Murray Sices Corporation*, 10 F.R.D. 367 at 370, where the District Court for the Southern District of New York said:

" * * * under the Federal Rules a pleading should not be dismissed

submit that the Court of Appeals has not so construed the amended complaint. That Court chose not only to disregard the allegations of the pleading but also to state the facts to be contrary to the allegations.

5.02 Re Ownership and Control of Land on Which the Fire Started

It is patent from the language of its opinion that the Court of Appeals misunderstood the facts concerning title to and control of the railroad right of way and the influence of those facts on this case. The complaint (R. 11) states that the Government "owned, had control of and free and unrestricted access to" both the railroad right of way and the adjoining lands. This is the land which contained an accumulation of fire-hazardous combustibles. This is the land on which the fire started and through which the Government negligently permitted defective railroad equipment to operate in a fire-hazardous manner. This is the land from which the Government negligently permitted the fire to spread to the 1600-acre area. In Washington special responsibilities attach to the ownership and control of land in forested areas. Obviously the extent of the Government's ownership and its right of control of and responsibility for conditions and practices on the land where the fire started, including the right of way over which the defective railroad equipment was operated, are matters of primary importance. The Court of Appeals disregarded the foregoing allegation and unjustifiably assumed facts different than those alleged with respect to

unless it appears to a certainty that the pleader is entitled to no relief under any state of facts which could be proved in support of the claim."

the ownership and control of the land on which the fire started. Its opinion, 225 F.2d 642 at 646 (R. 85), implies that the Government had only "a right to enter and inspect the right of way" and that such was the limit of its right and title. That is contrary to the complaint.

From the cases cited in 225 F.2d 642, at 646 (R. 84), both in the text and in the footnote, the Court of Appeals apparently adopted the erroneous supposition of the Government's brief with respect to title and possessory rights in the right of way. Contrary to the clear allegation of Government ownership and control, the Court said that "The Government, under the allegations of the complaint, was an adjoining landowner to whose property fire, ignited on the property of a third party, has spread" (R. 85). Based upon such erroneous treatment of the facts the Court discusses and cites authorities applicable only to the rights and duties of the owners of dominant and servient estates as between themselves. Those cases are not pertinent to the case at bar. Regardless of the rights and duties of the Government and the railroad company, *inter sese*, petitioner, as a third party, has been damaged and under the facts pleaded it has a right if it so chooses to hold either or both the dominant and servient owners accountable. On such incorrect treatment of the facts, the Court of Appeals also erroneously rejected the Government's liability and responsibility as one owning and having control of lands in a forest area in the State of Washington.

Moreover, even if one treats the Government as "an adjoining landowner to whose property fire, ignited on the property of a third party, has spread," it does not

follow, as the Court of Appeals suggests, that cases such as *LeRoy Fibre Co. v. Chicago M. & St. P. R. Co.*, 232 U.S. 340 (1914) and those cited in footnote 4 of the Opinion are applicable to the case at bar. Those cases hold there is no contributory negligence by the plaintiff who has failed to conform use of his land to the use of adjoining land and has suffered damage as a consequence. Typically, they are urban, industrial situations where a plaintiff builds a warehouse adjacent to defendant's theretofore established railroad or chemical plant which is a known fire hazard. Granting that in some such cases a landowner is not required to conform the use of his land to that of the adjoining land, the principle invoked in those cases is not applicable to the case at bar. The lands here involved are forest lands, useful for no other purpose. The railroad right of way runs through forest lands. The Washington forestry statutes require that all such lands, including railroad right of way and adjoining lands be cleared of debris because of the fire hazard. The Washington law requires that all such lands conform to standards which will minimize or eliminate fire risk, regardless of the use to which the same may be put. It is to that extent and to that extent only that we insist the Government lands adjoining the right of way must conform. Failure to conform to the standard thus established is negligence.

In discussing the cases on this subject the Opinion (R. 85) acknowledges "There is a division of authority on the question of whether failure to maintain safe conditions on adjoining land may constitute contributory negligence in a suit by such landowner to recover

against the party responsible for the fire." The Opinion then cites the Washington case of *Stephens v. Mutual Lumber Co.*, 103 Wash. 1, 173 Pac. 1031 (1918) as one of the authorities holding that failing to conform the use of one's land to that of the adjoining land is negligence, but then adopts the opposing line of cases as the Court's ruling, in direct conflict with the applicable Washington case. If there is a division of authority, the case at bar should be controlled by the Washington decisions and not by *Leroy Fibre Co.*, a case with a Minnestoa background.

In discussing this same question, the Opinion declines to follow *Riley v. Standard Oil Co. of Indiana*, 214 Wis. 15, 252 N.W. 183 (1934) the only case cited to the Court which is directly in point, because it is an "extreme" one. Relative to other states, Washington may or may not be extreme in the standards which it is required to impose in order to protect against forest fire hazards. It is sufficient to say they are comparable to the standards sustained in the *Riley* case by the Supreme Court of Wisconsin. Moreover, under the Tort Claims Act, it makes no difference whether the standards are relatively high or relatively low. The plain language of the act, as interpreted by this Court, makes clear that the Government is required to conform to the same standard of conduct as private individuals under like circumstances according to the place where the act or omission occurred.

On page 646 of the reported opinion (R. 88) the Court observes:

" * * * To hold an intermediate landowner liable for damage to property caused by fire passing over

his land, to all parties subsequently damaged notwithstanding the efforts of public firemen to extinguish the fire, would be to impose a harsh rule."

This comment is made with respect to a fire which starts on the land of a third party.

The Court's observations here are erroneous for two reasons. In the first place, the fire started on land which "defendant owned, had control of and free and unrestricted access to" (R. 11). It did not start on land of another and then spread across the Government's land. Secondly, the statute, Am. Rem. Supp. 1945 § 5806, R.C.W. § 76.04.380, prescribes a standard of care for "the owner, operator or person in possession of land, on which a fire exists, or from which it may have spread, notwithstanding the origin or subsequent spread thereof on his own or other lands."

5.03 Re Proximate Cause

Paragraph XXXVI of the amended complaint (R-29) alleges that each of the numerous acts and omissions of negligence described in the amended complaint was a direct and proximate cause of the damage. The acts and omissions of negligence to which reference is made occurred both before the fire started in permitting fire hazardous conditions and practices on Government owned and controlled land, and after the fire started when the Forest Service employees failed to extinguish the fire at three different stages, that is the spot fire stage, the 60 acre stage and the 1,600 acre stage.

The fire which started on August 6, 1951, was caused by sparks thrown from a passenger train, negligently permitted to operate, into improper accumulations of

inflammable material on Government owned and controlled lands. That same fire burned in a natural and continuous sequence thereafter, unbroken by any new or independent cause, and produced the damage to petitioner's property. Without that fire which started August 6, the damage to petitioner's property would not have occurred. Under Washington law those conditions and practices and the fire which started as a result were a proximate cause of the damage. Likewise the negligence of the Forest Service in failing to extinguish the fire immediately during the spot fire stage and again at the 60 acre stage, by failing to use sufficient men, equipment and water, also directly contributed to and were a proximate cause of the damage.

The definition of proximate cause under the law of Washington is the same as elsewhere, namely that cause which in a natural and continuous sequence, unbroken by any new or independent cause, produces the damage complained of and without which the damage would not have occurred.

Squires v. McLaughlin, 44 Wn.2d 43, 265 P. 2d 265 (1953).

Federal Rules of Civil Procedure Rules 8 (e) and (f) provides that pleadings shall be simple, concise and direct; that no technical forms are required, and that all pleadings shall be construed so as to do substantial justice. Forms 9 and 10, approved by Rule 84, indicate that in pleading proximate cause it is necessary only to state the facts and then to say "As a result, plaintiff [was injured]". The Court of Appeals does not sug-

gest any deficiency in petitioner's allegation of proximate cause.

In Washington proximate cause is a question of fact, not a question of law, except in rare circumstances, and should be determined by the trier of the facts.

McInnis v. Squires, 136 Wash. 10, 238 Pac. 825 (1925);

McLeod v. Grant County School District, 42 Wn.2d 316, 255 P.2d 360 (1953);

Fleming v. Seattle, 45 Wn.2d 477, 483, 275 P. 2d 904 (1945);

Palin v. General Construction Co., 47 Wn.2d 246, 287 P.2d 325 (1955).

Notwithstanding the allegations of the amended complaint and in spite of the rules of construction and the law above referred to, the Court of Appeals, in obscure and confusing language, said, 225 F.2d at page 644 (R. 81):

“ * * * In our opinion it was this recurrence of fire on the 1600-acre tract which was the sole proximate cause of the injury to appellant's property and that risks, if any, created by the acts or omissions of agencies of the Government prior to the containment of the fire in the 1600-acre area had terminated. * * * ” (Emphasis added)

Why was such “recurrence” of fire the sole proximate cause? The Opinion does not explain. The fire did not recur. It was the same fire that started August 6 still burning, the same men still acting, the same timber which was in jeopardy, and the same dry weather conditions. The fire did not start in the 1600-acre tract.

It would have not reached the 1600-acre tract nor ever have started were it not for the conditions and events which occurred before it reached that tract.

When did the risks, created prior to the containment of the fire, terminate and what caused them to terminate? The Opinion does not explain. Does the Court below intend to imply that when one responsible for the start of a fire has it contained and under control his duty has ended or that the risk of fire has thereby terminated? If so, that is contrary to Washington law.

The Washington statutes establish that the risk from fire does not terminate until the fire is extinguished. They require, in so many words, that the landowner *and* the party responsible for the fire and the fire-hazardous conditions both control *and* extinguish the fire. A doctor's obligation does not end when he stops the flow of blood; he must disinfect the wound and sew it up. Half-way measures are no more tolerated by Washington forestry laws.

Does the above quote from the Opinion imply that there was an intervening force or superseding cause which ended the force of the original cause? The Opinion does not explain, although the authorities cited in Opinion footnote 1 in support of the quote suggest that the Court might have in mind some intervening force or superseding cause. Those authorities deal with unforeseeable intervening force and superseding cause. They are not applicable to the facts in the case at bar because the amended complaint here specifically alleges that everything contributing to the September break-away fire was foreseeable and could have been guarded

against and avoided by prudent conduct. This includes the pre-August 11th condition of and practices on the Government owned and controlled right of way and adjoining lands (R. 11-13) and the wind and weather (R. 10, 15, 23, 24, 27).

The only intervening force apparent to us is the Forest Service employees' negligence in doing nothing. The Opinion quotes paragraph XXXII of the Complaint, which describes the Forest Service doing nothing, and then simply says, page 644 (R. 81) :

“On these facts, liability may not be predicated on conduct occurring before the spread of the fire to the 1600-acre tract.”

The Opinion says that at this point the Forest Service employees became public firemen. It implies that if the Government is negligent only once in its capacity as landowner or volunteer, it will be held accountable, but if it is negligent twice, once as a landowner or as a volunteer and later as a public fireman, it will not be liable at all.

In other words the Court of Appeals concluded that, so far as the Government is concerned, nothing that existed or occurred prior to August 11 is material and cannot be a proximate cause of the damage. That conclusion is possible only through a gross misunderstanding of the amended complaint and an erroneous interpretation of the law. According to the Court of Appeals, even if it be granted that a private party under like circumstances could be negligent and liable, the acts and omissions alleged herein, though negligent, having been those of Forest Service employees are superseded as a proximate cause by the intervening act of those same

Forest Service employees putting on their fireman's hats and thereafter proceeding negligently in their immune status as public firemen. Those ratiocinations are not compatible with the rules established by this and other courts that the complaint be construed in the light most favorable to plaintiff and so as to do substantial justice.

If, as the Court of Appeals' opinion implies, there are questions of unforeseeable intervening force, superseding cause or termination of risk, those are matters of defense which the Government can raise when it pleads further and are questions of fact on which petitioner is entitled to be heard. There is nothing in the record justifying those questions at this time nor justifying a dismissal of the complaint on those grounds. The District Court held that but for *Dalehite* he would have denied the Government's motion to dismiss and would have found that the complaint sufficiently alleges a claim for which relief can be granted (R. 41). A fair reading of the complaint makes it unmistakable that the fire-hazardous conditions and practices on Government owned and controlled property, negligently permitted by Government employees, effectively contributed to, and made possible and were the proximate cause of the fire which started August 6. Likewise, the fire which started on government owned and controlled land on August 6 burned continuously thereafter and did the damage complained of. The fire burned in a natural and continuous sequence unbroken by any new, independent cause and produced the damage to petitioner's property. Without that fire which started August 6, the damage to petitioner's property would

not have occurred. No construction or interpretation of the complaint is necessary in order to draw the foregoing facts from it.

From the foregoing discussion of the opinion of the Court below, it is obvious that the Court of Appeals has misconstrued the clear allegations of the complaint; has drawn inferences of fact which not only are unwarranted but contrary to the allegations of the complaint; has misconstrued the relationships between the Government and petitioner; has compounded error upon error, and has so confused the record as to call for the exercise by this Court of its powers of supervision.

Whether this Court does or does not reverse the courts below on the basic question of immunity of the Government from liability for acts of public firemen—and we believe it will, it is of primary importance that this Court correct the gross error of the Court of Appeals in its misconstruction of the amended complaint. Not only has the Court of Appeals greatly prejudiced petitioner, but we earnestly believe the opinion to be bad law which should not be permitted to stand with the precedential authority attaching to a case which is reviewed by the Supreme Court of the United States.

SUMMATION

The United States Government is big and its activities include or directly affect the conduct of almost every type of business and industry. Government employees have jobs and duties and functions identical to those of employees of private concerns and they make the same mistakes and cause like injury. It was in this climate of participation by Government that the Federal Tort Claims Act evolved. There was and is a definite need for it by every legal, political, economic, social and just standard of this country. No citizen should be left without redress for a wrong done to him simply because of the fortuitous circumstance that the trespasser is a public, rather than a private, servant. If one's toe is stepped on, it hurts just as much whether the trespasser draws his pay check from the Government or from a private employer. Fire burns with the same devastation whether it starts on one side of a section line or the other.

Recognizing the unfairness to citizens who are left without recourse for damage caused by Government employees, Congress passed the Tort Claims Act, thereby intending to put the Government on a parity with its citizens.

In the case at bar the Government owns land and timber which it manages and operates for profit, just as do petitioner and other private parties in the area. It has employees to look after that timber just as do private owners, and its employees go about their work doing the same chores and having the same opportunities for doing a good, bad or indifferent job as do em-

ployees of private owners. Government timber and private timber are intermingled and what is good or bad for one timber owner is equally good or bad for the other timber owners in the area.

Timber is a major, but limited, resource, the preservation and perpetuation of which is a matter of concern both to private industry and to public agencies. For its own selfish economic well-being, private industry must assure itself of continued existence by safeguarding and harvesting in an orderly manner the timber which it controls. The citizens of this state, who are a part of the industry, have imposed on themselves, through the state legislature, standards of care and conduct to which they must conform for the general and particular welfare of all persons. Those standards of care are not materially different from the standards established through the exercise of sound and prudent judgment which is reflected in the common law. If to a stranger those standards seem high or harsh, such reaction can be ascribed to a lack of understanding and appreciation of the practical methods of raising, managing and harvesting the timber crop consistent with the observance of precautions and protections against fire hazards. It is self-evident that the standards prescribed by Washington statutes are not unduly high or harsh, because those standards are self-imposed and because the timber industry has operated successfully under them, with only minor variations, for more than seventy years.

Neither can it be argued in derogation of those statutes that they are any less pertinent in civil cases just because criminal penalties attach to their violation, or

because the offending party may by statute be made liable to reimburse the state if the latter is compelled to take the action which the responsible party should have taken in abating hazardous conditions or suppressing fires.

The United States owns a substantial majority of the timber and timber growing lands in the Pacific Northwest. For the economic well-being of the country, it must make much of that timber available to private industry in order that the whole nation may enjoy the fruits of this resource. It follows with at least equal validity and importance that Government lands in forest areas, and the conduct of federal employees in the pursuit of their work, should properly and in fairness conform to the same standards as private individuals for the protection of all timber, public as well as private.

The Fire Suppression plan which the Forest Service adopted, and which is described in the amended complaint (R. 16-17), was similar to that which most private owners established for themselves, for private owners recognize the primary responsibilities which attach to them as owners, and the losses which they and others will sustain if fire occurs on their property. All such plans recognize the inadequacy of the men and equipment of just one party to cope with a major fire and they contemplate the cooperation of neighbors to furnish men and equipment to fight the common enemy. That practice is common in the industry, and Government in this case is a part of that industry.

Whether it was a matter of expediency or policy, it

so happens that the Forest Service committed itself to take charge in case of fire in this area. If the Forest Service had not done so, it could have been the petitioner herein or some other company or an association of private timber owners which undertook that responsibility, as both state and federal agencies are authorized by statute to make such arrangements with private parties to set up fire protection procedures. 16 U.S.C. §565; Rem. Rev. Stat. §5784; RCW 76.04.050. When the Forest Service decided to undertake this leadership and when it did in fact assume exclusive supervision and control of the fire-fighting activities, and induced reliance by petitioner and others upon the Forest Service performance of that job, the District Ranger and his subordinates were obligated to do their work prudently and with due care under the circumstances. It does not matter whether one judges the status of the Forest Service employees as agents of a landowner, as agents of one who has contracted to assume this leadership, or as volunteers. The Government's duties and obligations stem from each such status. The fact remains that the Forest Service employees did act and were bound to exercise due care; and that by failing to exercise due care they were negligently responsible for the losses which ensued.

We have repeatedly put to Government counsel, and they have just as repeatedly ignored, the following question, the answer to which, in our judgment, is determinative of this case:

“Let us assume that the positions of the parties to this lawsuit were exactly transposed, that is, that the United States was the plaintiff and Rayonier,

the petitioner herein, was the defendant, and that the conditions, acts and omissions described in the amended complaint were those created, tolerated or committed by petitioner and its employees. Is there any reason in fact or in law why the positions of the parties could not be transposed in all material respects and, in such example, would petitioner be liable to the United States?"

To us this case should be a clear one in which petitioner is holding its neighbor responsible and accountable for failing to conduct itself in the same manner as the neighbor expects petitioner to act, and in which the neighbor would look to petitioner for redress were the situations reversed.

CONCLUSION

We respectfully suggest that the District Court and the Court of Appeals erred in dismissing the amended complaint and ask this Honorable Court to reverse the order and judgment herein reviewed and that, in doing so, this Court, among other things, make clear that the standards to which Government employees must conform and the responsibilities of the United States as a timber and land owner and operator are the same as those required of the citizens of the State of Washington.

Respectfully submitted,

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APPENDIX A

FEDERAL STATUTES INVOLVED

Federal Tort Claims Act

28 U.S.C. §1346

§1346. *United States as Defendant*

“(a) * * *

“(1) * * *

“(2) * * *

“(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

“(c) * * *

“(d) * * *

“(1) * * *

“(2) * * *

“June 25, 1948, c. 646, 62 Stat. 933, amended Apr. 25, 1949, c. 92, §2(a), 63 Stat. 62; May 24, 1949, c. 139, §80 (a, b), 63 Stat. 101.”

28 U.S.C. §2671**“§2671. *Definitions***

“As used in this chapter and sections 1346 (b) and 2401 (b) of this title, the term—

“ ‘Federal agency’ includes the executive departments and independent establishment of the United States, and corporations primarily acting as, instrumentalities or agencies of the United States but does not include any contractor with the United States.

“ ‘Employee of the government’ includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

“ ‘Acting within the scope of his office or employment,’ in the case of a member of the military or naval forces of the United States, means acting in line of duty. June 25, 1948, c. 646, 62 Stat. 982, amended May 24, 1949, c. 139, §124, 63 Stat. 106.”

28 U.S.C. §2674**“§2674. *Liability of United States***

“The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

“ * * * June 25, 1948, c. 646, 62 Stat. 983.”

28 U.S.C. §2680**“§2680. *Exceptions***

“The provisions of this chapter and section 1346(b) of this title shall not apply to—

“(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

“(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

“(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

“(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

“(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

“(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

“(g) Repealed. Sept. 26, 1950, c. 1049, §13(5), 64 Stat. 1043.

“(h) Any claim arising out of assault, battery, false

imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

“(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

“(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

“(k) Any claim arising in a foreign country.

“(l) Any claim arising from the activities of the Tennessee Valley Authority.

“(m) Any claim arising from the activities of the Panama Canal Company. As amended Sept. 26, 1950, c. 1049, §§2(a)(2), 13(5), 64 Stat. 1038, 1043.”

Statute Authorizing Cooperative Forest Protection Contracts

16 U.S.C. §565

“§565. Cooperation by Secretary of Agriculture with State officials in protection of timbered and forest-producing lands from fire; limitation on amount of expenditures by United States

“If the Secretary of Agriculture shall find that the system and practice of forest-fire prevention and suppression provided by any State substantially promotes the objects described in section 564 of this title, he is hereby authorized and directed, under such conditions as he may determine to be fair and equitable in each State, to cooperate with appropriate officials of each State, and through them with private and other agen-

cies therein, in the protection of timbered and forest-producing lands from fire. In no case other than for preliminary investigation shall the amount expended by the Federal Government in any State during any fiscal year, under this section, exceed the amount expended by the State for the same purpose during the same fiscal year, including the expenditures of forest owners or operators which are required by State law or which are made in pursuance of the forest-protection system of the State under State supervision, and the Secretary of Agriculture is authorized to make expenditures on the certificate of the State forester, the State director of extension, or similar State official having charge of the cooperative work for the State, that State and private expenditures as provided for in this section have been made. In the cooperation extended to the several States due consideration shall be given to the protection of watersheds of navigable streams, but such cooperation may, in the discretion of the Secretary of Agriculture, be extended to any timbered or forest-producing lands or watersheds from which water is secured for domestic use or irrigation within the cooperative States. As amended July 25, 1947, c. 32 §1, 61 Stat. 449."

16 U.S.C., §551

"§551. *Protection of national forests; rules and regulations.* The Secretary of Agriculture shall make provisions for the protection against destruction by fire and depredations upon the public forests and national forests which may have been set aside or which may be hereafter set aside under the provisions of section 471

of this title, and which may be continued ; and he may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction ; and any violation of the provisions of sections 473-482 of this title or such rules and regulations shall be punished as is provided for in section 104 of Title 18. June 4, 1897, c. 2, §1, 30 Stat. 35 ; Feb. 1, 1905, c. 288, §1, 33 Stat. 628."

APPENDIX B

WASHINGTON STATUTES INVOLVED

**Laws of 1869, p. 154, §601; Rem. Rev. Stat. §950;
RCW 4.08.110:**

“An action at law may be maintained by any county, incorporated town, school district or other public corporation of like character in this state, in its corporate name, and upon a cause of action accruing to it, in its corporate character and not otherwise, in any of the following cases:

(1) Upon a contract made with such public corporation;

(2) Upon a liability prescribed by law in favor of such public corporation;

(3) To recover a penalty or forfeiture given to such public corporation;

(4) To recover damages for an injury to the corporate rights or property of such public corporation.”

(This statute subsequently was amended by Laws of 1953, Ch. 118, §1.)

**Laws of 1869, p. 154, §632; Rem. Rev. Stat. §951;
RCW 4.08.120:**

“An action may be maintained against a county or other of the public corporations mentioned or described in preceding section, either upon a contract made by such county or other public corporation in its corporate character and within the scope of its authority, or for an injury to the rights of the plaintiff arising from some act or omission of such county or other public

corporation." (This statute subsequently was amended by Laws of 1953, Ch. 118, §2.)

Laws of 1909, Ch. 249, §271; Rem. Rev. Stat. §2523; RCW 76.04.220:

"§271. Negligent Fires

"Every person who shall wilfully or negligently set, or fail to carefully guard or extinguish any fire, whether on his own land or the land of another, whereby the timber or property of another shall be endangered, or who shall fail to respond to any lawful summons to aid in guarding or extinguishing any fire, shall be guilty of a misdemeanor."

Laws of 1877, p. 300, §3; Rem. Rev. Stat. §5647; RCW 4.24.040:

"If any person shall for any lawful purpose kindle a fire upon his own land he shall do it at such time and in such manner and shall take such care of it to prevent it from spreading and doing damage to other persons' property as a prudent and careful man would do, and if he fail so to do he shall be liable in an action on the case to any person suffering damage thereby to the full amount of such damage."

Laws of 1877, p. 300, §; Rem. Rev. Stat. §5648; RCW 4.24.050:

"Persons engaged in driving lumber upon any waters or streams of this Territory, may kindle fires when necessary for the purposes in which they are engaged, but shall be bound to use the utmost caution to prevent the same from spreading and doing damage; and if

they fail so to do, they shall be subject to all liabilities and penalties of this act, in the same manner as if the privilege granted by this action had not been allowed."

Laws of 1877, p. 301, §6; Rem. Rev. Stat. §5649; RCW 4.24.060:

"The common law right to an action for damages done by fires, is not taken away or diminished by this act, but it may be pursued, notwithstanding the fines or penalties set forth in the first and second sections of this act; but any person availing himself of the provisions of the third section [shall] be barred of his action at common law for the damages so sued for, and no action shall be brought at common law for kindling fires in the manner described in the fifth section; but if any such fires shall spread and do damage, the person who kindled the same and any person present and concerned in driving such lumber, by whose act or neglect such fire is suffered to spread and do damage shall be liable in an action on the case for the amount of damages thereby sustained."

Laws of 1929, Ch. 207, §3; Rem. Rev. Stat. §5789; RCW 76.04.180:

"No one shall burn any forest material or the waste or debris resulting from logging or land clearing operations until such work shall have been done in and around the slashing or chopping and/or the area proposed to be burned over to prevent the spread of fire therefrom as shall be required to be done by the state supervisor of forestry, or any warden or ranger. The said supervisor or any warden or ranger may require

the cutting of such dry snags, stumps and dead trees within the area to be burned, which in his judgment constitute a menace or are likely to further the spread of fire therefrom.

“When any person shall have obtained permission from the said supervisor, warden or ranger, to burn any slashings made for the purpose of clearing land, the warden may, at his discretion, furnish him with a man to supervise and control the burning, who shall represent and act for such warden, and shall have all the power and authority of a warden while engaged in such service, including the right to revoke such permit, if in his opinion the burning authorized would endanger any valuable timber or other property. Such a man shall serve only until such time as the party burning may be able to keep the fire under control himself.

“The said supervisor and wardens are hereby authorized and empowered to employ a sufficient number of men to extinguish or prevent the spreading of any fires that may be in danger of destroying any valuable timber or other property of the state. The said supervisor, or any warden by special authority of the said supervisor, may provide needed tools and supplies, and transportation when necessary for men so employed.

“Every man so employed, and also the representative of the warden supervising the burning, shall be entitled to compensation at a rate to be fixed by the director of the department of conservation and development, and the warden shall issue a certificate to each man so employed showing the number of hours worked by him and the amounts due to him, upon which, after

approval by said supervisor, the men shall be entitled to receive payment from the state in the manner provided for in section 5783.

“Any person refusing to render assistance when called upon by any warden, shall be guilty of a misdemeanor, and shall be punished by a fine of not less than ten dollars (\$10.00) nor more than one hundred dollars (\$100.00).”

Laws of 1951, Ch. 58, §4; Am. Rem. Supp. 1941, §5794 (part); RCW 76.04.250:

“§4. It shall be unlawful for anyone to operate within one-eighth mile of any forest land between the fifteenth day of April and the fifteenth day of October, which period shall be designated as the closed season unless the designated season is extended by the supervisor due to dangerous fire conditions:

“(1) Any woods operation or mill using spark-emitting or electric engines unless provided with the following fire tools, or the serviceable equivalent thereof, at each landing, and/or yarding tree or mill:

“(a) For operations employing more than five men:

“To be kept in a sealed tool box: Three axes, six shovels and six adze hoes;

“To be kept adjacent to the tool box: Two bucking saws with handles, and one five-gallon pump can filled with water.

“(b) For operations employing five men or less:

“To be kept in a sealed tool box: Two axes, three shovels, and three adze hoes;

"To be kept adjacent to the tool box: One bucking saw with handles, one hundred gallons of water and two buckets.

"(2) Any gasoline, diesel, or electric yarding, skidding, or loading engine unless:

"(a) Equipped with two chemical fire extinguishers of not less than one and one-half quart capacity;

"(b) Exhaust is turned up perpendicular and is clear of all obstructions or is equipped with an adequate spark arrestor:

"(3) Any tractor unless:

"(a) Equipped with one chemical fire extinguisher of not less than one quart capacity;

"(b) It has exhaust turned up perpendicular or is equipped with an adequate spark arrestor.

"(4) Any truck hauling forest products from any forest area unless:

"(a) Equipped with a chemical fire extinguisher of at least one quart capacity;

"(b) Equipped with one axe;

"(c) Equipped with one shovel;

"(d) Exhaust is turned up perpendicular or equipped with adequate spark arrestor or muffler.

"(5) Any portable power saw unless the power saw operators keep in their immediate possession, a chemical fire extinguisher of at least eight ounce capacity, or a serviceable shovel.

"(6) Any gasoline or diesel engine used in a mill or for uses not specifically mentioned above unless:

“(a) Equipped with chemical fire extinguisher of at least one quart capacity;

“(b) Exhaust is pointed up perpendicular and is clear of all obstructions or is equipped with an adequate spark arrestor;

“(c) One hundred gallons of water and two buckets.”

Laws of 1951, Ch. 58, §5; Am. Rem. Supp. 1941, §5794 (part); RCW 76.04.260:

“§5. It shall be unlawful for anyone to operate within one-eighth mile of any forest land between the fifteenth day of April and the fifteenth day of October, which period shall be designated as the closed season unless the designated season is extended by the supervisor due to dangerous fire conditions:

“(1) Any spark-emitting railroad logging locomotive unless:

“(a) Equipped with a safe and suitable device for arresting sparks;

“(b) Equipped with a suitable power pump with a capacity of not less than twenty gallons per minute at pressures not less than forty pounds per square inch;

“(c) Equipped with three hundred feet of hose not less than one inch in diameter equipped with a standard nozzle;

“(d) Equipped with all the complement of hand tools listed under section 1(a) of section 76.04.250, kept in a sealed tool box on such locomotive ready for instant use;

“(e) Equipped with a sprinkler system which can be capable of wetting the tracks and at least two feet on either side of each rail. Such sprinkler system shall be manually controlled from the cab. The water supply tank for such sprinkler shall be capable of carrying an adequate supply of water in direct relation to the mileage of track covered and the available water supply;

“(f) During the closed season it is followed by a speeder or other patrol. Such patrol shall be equipped with two shovels, one axe, and one five-gallon pump can filled with water. When a logging train operates on a common carrier track the patrol will be regulated under laws pertaining to common carrier railroads.

“(2) Any common carrier railroad trains operating through forest lands unless:

“(a) Such trains are followed by a speeder patrol at such times and in such places as the supervisor may designate, each patrol to be equipped with a five-gallon fire extinguisher, two shovels and one axe. In case a railroad company fails to provide patrol as required, the supervisor is hereby authorized to employ patrolmen for such purpose and the railroad company concerned shall be liable for the expense of the same to be collected in a civil suit brought by the state against said railroad company;

“(b) At the request of the supervisor, such common carrier maintain pumping equipment and fire fighting tools specified by the supervisor but not to exceed those required of logging locomotives.

“(3) Any steam logging engine or boiler unless:

“(a) Being equipped with and using a safe and suitable device for arresting sparks:

“(b) Equipped with a suitable power pump with a capacity of not less than twenty gallons per minute at pressures of not less than forty pounds per square inch;

“(c) Equipped with three hundred feet of hose not less than one inch in diameter equipped with a standard nozzle.

“(4) Any railroad locomotive, logging locomotive, logging or other engine or boiler unless equipped with an adequate device to prevent the escape of fire or live coals or other burning substance from all ash pans, and all fire boxes, except when ash pans or fire boxes are being cleaned when not in motion. Any donkey boiler, when equipped to operate without the use of exhaust steam within the stack, and without any artificial means of creating a forced draught, shall not require a spark arrestor.”

Laws of 1951, Ch. 58, §6; Am. Rem. Supp. 1941, §5794 (part); RCW 76.04.270:

“§6. Every person violating the provisions of sections 76.04.250 and 76.04.260 shall upon conviction be punished by a fine of not less than twenty-five dollars nor more than seventy-five dollars and the judgment of the court, in case of conviction, shall prohibit such person from operating a train, railroad locomotive, logging locomotive, or other engine, power equipment or boiler until the requirements of such sections have been complied with.”

Laws of 1911, Ch. 125, §15; Rem. Rev. Stat. §5795; RCW 76.04.280:

“No one operating a railroad shall permit to be

deposited by his, or its, employees, and no one shall deposit during the closed season, fire or live coals upon the right-of-way outside of the yard limits, and within one-quarter of one mile of any forest material, without such deposit of fire or live coals shall be immediately extinguished.

“Any one violating the provisions of this section respecting the deposit of fire or live coals, shall upon conviction pay a fine of not less than twenty-five dollars (\$25.00), nor more than one hundred dollars (\$100.00) or be imprisoned in the county jail not exceeding thirty (30) days.

“Wardens and rangers shall report any lack of sufficient spark-arresters, and any lack of adequate devices for preventing the escape of fire and live coals, as provided in this act, to the forester, and to the prosecuting attorney of their county, and the superior court of that county where suit is first instituted, shall be jurisdiction of the offense.”

Laws of 1923, Ch. 184, §7; Rem. Rev. Stat. §5795-1; RCW 76.04.290:

“Railroad companies and other public carriers, or any person or persons, operating through forested districts, must report forthwith by telephone or telegraph any fires on or adjacent to their right-of-way or route, to the local fire warden or to the office of the state supervisor of forestry.”

Laws of 1917, Ch. 33, §3; Rem. Rev. Stat. §5796; RCW 76.04.310:

“Everyone clearing right-of-way for railroad, pub-

lic highway, private road, ditch, dike, pipe or wire line, or for any other transmission, or transportation utility right-of-way, shall pile and burn on such right-of-way all refuse timber, brush and debris cut thereon, as rapidly as the clearing or cutting progresses, or at such other times as the forester, or his authorized representatives may specify, and if during the closed season, in compliance with the law requiring burning permits. No one clearing any land or right-of-way, or in cutting or logging timber for any purpose, shall fell, or permit to be felled, any trees so that they may fall on to land owned by another, without first obtaining permission from such owner in addition to complying with the terms of this section for the disposal of refuse. All the terms of this section and other forest laws of the state shall be observed in all clearings of right-of-way or other land on behalf of the state itself or any county thereof, either directly or by contract; and unless unavoidable emergency prevents, provision shall be made by all officials directing such work for withholding a sufficient portion of the payment therefor, until the piling and burning is completed, to insure the completion of the piling and burning in compliance with the provisions of this section."

Laws of 1923, Ch. 184, §9; Rem. Rev. Stat. §5803; RCW 76.04.340:

"Any person or persons who shall wilfully and deliberately set fire to any forest within the state, or in any place from which fire may be communicated to any such forest, or who shall accidentally set fire to any such forest, or to any place from which fire may be

communicated to any such forest, and shall not extinguish the same or use every effort to that end, or who shall build any fire for lawful purposes or otherwise in or near any such forest, and through carelessness or neglect shall permit said fire to extend to and burn through such forest, shall be deemed guilty of a misdemeanor, and on conviction before a court of competent jurisdiction shall be punishable by fine not exceeding one thousand dollars (\$1,000.00) or imprisonment not exceeding one year, or by both such fine and imprisonment."

Laws of 1941, Ch. 168, §2; Rem. Supp. 1941, §5804; RCW 76.04.350:

"Every owner of forest land in the State of Washington shall furnish or provide therefor, during the season of the year when there is danger of forest fires, adequate protection against the spread of fire thereon or therefrom which shall meet with the approval of the State Forest Board; *Provided*, That for the purposes of this section forest lands, lying in counties east of the summit of the Cascade mountains, shall be deemed to be adequately protected where patrol is furnished by the United States forest service of a standard and efficiency and seasonal duration, deemed by the State Forest Board to be sufficient for the proper protection of the forest land of such counties."

Laws of 1951, Ch. 58, §9; Am. Rem. Supp. 1945, §5806; RCW 76.04.380:

"Any fire on any forest land burning uncontrolled and without proper action being taken to prevent

its spread, notwithstanding the origin of such fire, is a public nuisance by reason of its menace to life and property. The owner, operator, or person in possession of land, on which a fire exists, or from which it may have spread, notwithstanding the origin or subsequent spread thereof on his own or other lands, shall make every reasonable effort to control and extinguish such fire immediately after receiving written notice to do so from the supervisor, or a warden or ranger; and if such owner, operator, or person in possession refuses, neglects, or fails to do so, the supervisor or any fire warden or forest ranger shall summarily abate the nuisance thus constituted by controlling or extinguishing the fire and the cost thereof may be recovered from such owner, operator, or person in possession and if the work is performed on the property of the offender, shall also constitute a lien upon the property or chattels under his ownership. Such lien may be filed by the supervisor in the office of the county auditor and foreclosed in the manner provided by law for the foreclosure of mechanics' liens. The prosecuting attorney shall bring the action to recover the cost or foreclose the lien, upon the request of the supervisor.

"The payment of forest patrol assessment on the land shall be interpreted as a reasonable effort in suppressing and extinguishing any fire on the land except when the fire started on that land as a result of owner/operator negligence and except when extra debris is present as described under the laws pertaining to slash responsibility.

"When a fire occurs in a logging operation it shall be fought to the full limit of available employees, and

such fire fighting shall be continued with the necessary crews in such numbers as are, in the opinion of the supervisor or his authorized deputies, sufficient to bring the fire to a patrol basis, and the fire shall not be left without a fire fighting crew or fire patrol until authority so to do has been granted in writing by the supervisor or his authorized deputies."

Laws of 1951, Ch. 235, §1; Am. Rem. Supp. §5807; RCW 76.04.370:

"Any land in the state covered wholly or in part by inflammable debris created by logging or other forest operations, land clearing, or right-of-way clearing and which by reason of such condition is likely to further the spread of fire and thereby endanger life or property, shall constitute a fire hazard, and the owner thereof and the person responsible for its existence shall abate such hazard. If the state shall incur any expense from fire fighting made necessary by reason of such hazard, it may recover the cost thereof from the person responsible for the existence of such hazard or the owner of the land upon which such hazard existed, and the state shall have a lien upon the land therefor enforceable in the same manner and with the same effect as a mechanic's lien. Nothing in this section shall apply to land for which a certificate of clearance has been issued.

"If the owner or person responsible for such hazard refuses, neglects, or fails to abate the hazard, the supervisor may summarily cause it to be abated and the cost thereof may be recovered from the owner or person responsible therefor, and shall also be a lien upon the land

enforceable in the same manner with the same effect as a mechanic's lien. The summary action may be taken only after twenty days' notice in writing has been given to the owner or reputed owner of the land on which the hazard exists either by personal service or by registered letter addressed to him at his last known place of residence."

Laws of 1917, Ch. 105, §5; Rem. Rev. Stat. §5808; RCW 76.04.400:

"When any responsible protective agency or agencies composed of timber owners other than the state shall agree to undertake systematic forest protection in co-operation therewith and such co-operation shall appear more advantageous to the state than the maintenance of the independent system provided elsewhere by law, the state forester may, with the approval of the state board of forest commissioners, designate suitable areas to be official co-operative districts and substitute thereto whenever necessary, in place of the county wardens elsewhere provided by law, such district wardens, with such district headquarters and duties, as may be agreed upon by him and by the co-operating agencies to render such co-operation most effective. He may also co-operate in the compensation of such wardens, or in the payment of other expenses for the prevention and control of fire in such official fire districts, to such extent as the board of forest commissioners may deem equitable on behalf of the state, and claim for such payments shall be approved and paid in the manner prescribed for claims outside such co-operative districts."

Laws of 1949, Ch. 141, §1; Rem. Supp. 1949 §5817-1; RCW 76.04.410:

“The State Supervisor of Forestry shall, subject to the approval of the Director of the Department of Conservation and Development, have power, subject to the provisions hereof, to enter into contracts and undertakings with private corporations or rural fire protection districts for the protection and development of the forests or any designated forest area within the state.”

Laws of 1921, Ch. 67, §1; Rem. Rev. Stat. §5818; RCW 76.04.450:

“All forests and timber upon all lands in the State of Washington, lying west of a line one mile west of the eastern boundary of range ten west of the Wilamette Meridian and north of the north boundary line of Grays Harbor county, shall be protected and preserved from the fire hazard to which they are or may be exposed by reason of the unusual quantity of fallen timber upon such lands. It shall therefore be unlawful for any person, firm, company or corporation, their officers, agents or employees, to do or commit any act which shall expose any of the forests or timber upon such lands to the hazard of fire.”

[All of the land described in paragraph XI of the Amended Complaint (R. 11) is located within the area described in the foregoing statute.]

Laws of 1911, Ch. 125, §4, part; Rem. Rev. Stat. §5784, part; RCW 76.04.050, part:

“The supervisor, subject to the approval of the direc-

tor, may appoint trained forest assistants, possessing technical qualifications, and may employ necessary clerical assistants, and fix the amount of their salaries, which shall be payable monthly.

“He shall, under the supervision of the director, whenever he deems it necessary to the best interests of the state, co-operate in forest surveys, forest studies, forest products studies, forest fire fighting and patrol, and the preparation of plans for the protection, management, replacement of trees, wood lots, and timber tracts, with other states, the United States, the Dominion of Canada, or any province thereof, and with counties, cities, corporations, and individuals within this state. * * *

* * *

“ * * *

Laws of 1951, Ch. 58, §3; Am. Rem. Supp. 1945 §5792-1; RCW 76.04.230:

“When any fire hazard exists, or has been created by any logging or clearing operations, and whether the supervisor has declared the same to be a fire hazard or not, and whether or not an effort has been made to remove or abate such fire hazard, an application may be made to the supervisor for a certificate of clearance.

“As soon as practicable after the receipt of such written request the supervisor shall cause the area to be carefully inspected and if it is found that the unused material and debris has been properly disposed of or the fire hazard abated, through deterioration or utilization, the supervisor shall issue a certificate of clearance in duplicate, one copy to be delivered to the applicant

and one copy to be retained in the records of his office. Each such certificate of clearance shall describe with reasonable accuracy the slashing, chopping or other area on which the unused material or other debris or fire hazard has been satisfactorily disposed of or the fire hazard abated through deterioration or utilization, by subdivision, section, township, and range, shall give the approximate acreage of the area to which the certificate applies, shall name the person who created such slashing, chopping, unused material, or fire hazard, if known, and name the person by whom the disposal or abatement was done, shall give the date on which the area was inspected and the name of the person making the inspection, and shall certify that in the opinion of the inspector such unused forest material or debris has been properly disposed of or through deterioration or utilization the fire hazard abated. Such certificate of clearance shall be issued for any fraction or part of the area inspected when the inspector finds that only such fraction or part meets the requirements of satisfactory and legal disposition of such unused material or debris and of the abatement of such fire hazard.

“Whenever the supervisor determines that the burning of any area will result in the destruction of second growth or will be detrimental to the growth of a new forest crop, or that burning such area will create a greater fire hazard than already exists, he may issue a certificate of clearance therefor: *Provided*, That the owner and/or operator will still be responsible for the costs of fire fighting made necessary by said fire hazard and the supervisor will have the right to require extra protection to be given the area by the owner and/or

operator if the hazard warrants it: *Provided further*, That should owner elect not to continue to be responsible for fire fighting costs, he may in lieu thereof request the supervisor to be relieved of this responsibility and if agreeable with the supervisor, contract to pay to the division of forestry, or an organized forest protection agency approved by the supervisor a sum to be fixed by the supervisor.

“All certificates of clearance shall be conclusive evidence of the satisfactory and legal disposition and abatement of the unused material and debris and the fire hazard created thereby to the extent in such certificate set forth; but any such certificate may be cancelled or set aside, upon due notice served in writing by the supervisor for fraud or collusion in the procuring or issuance thereof, or in the event of non-compliance with any provision or condition therein.”

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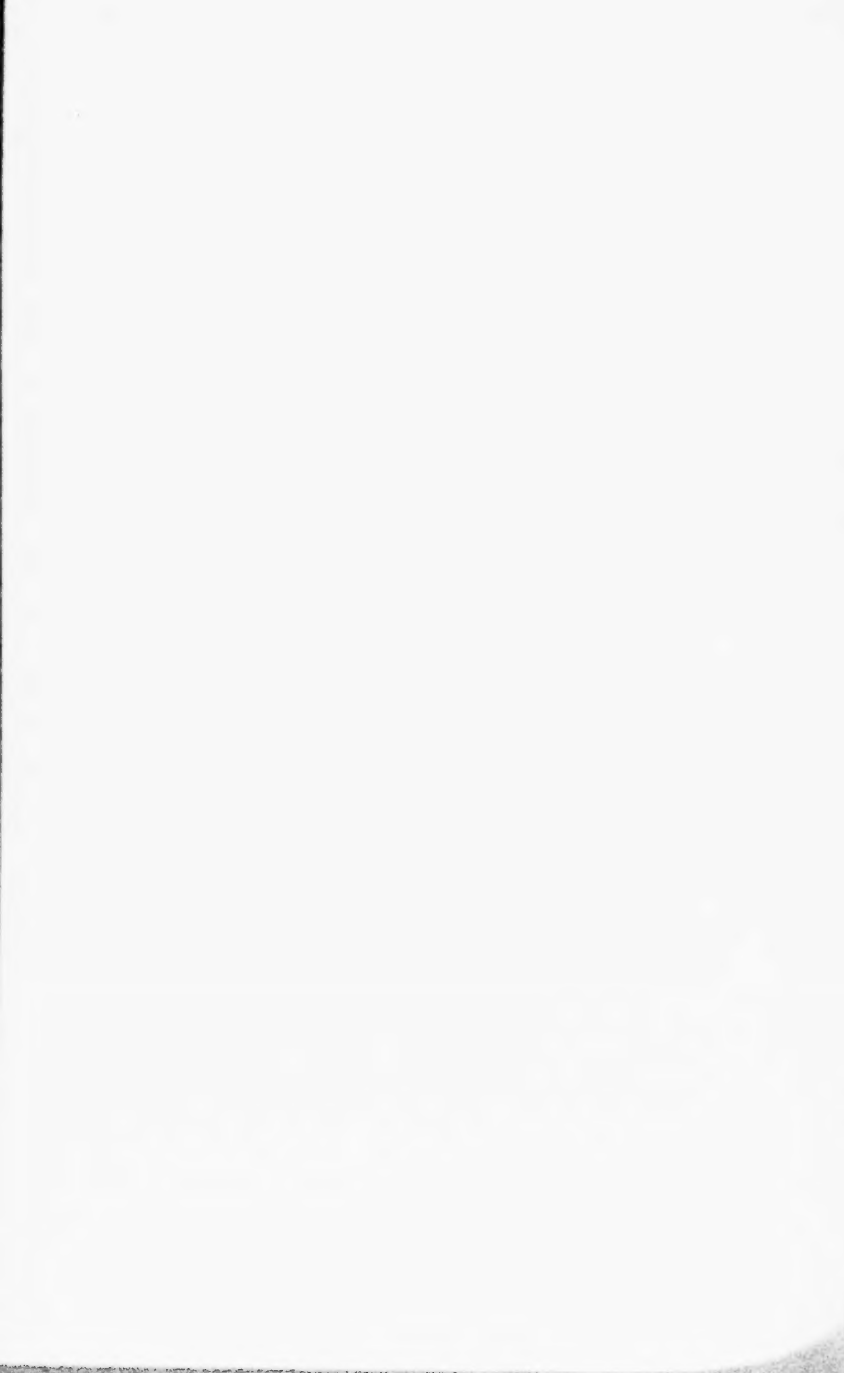
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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 45

RAYONIER INCORPORATED, A CORPORATION, PETITIONER
v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The United States District Court for the Western District of Washington, Northern Division, rendered no opinion. The opinion of the United States Court of Appeals for the Ninth Circuit (R. 79-89) is reported at 225 F. 2d 642.

JURISDICTION

The judgment of the Court of Appeals was entered on September 1, 1955 (R. 90). A petition for rehearing *en banc* was denied on October 14, 1955 (R. 90). On December 27, 1955, leave was granted to file a second petition for rehearing (R. 91). On January

10, 1956, the time for filing a petition for a writ of certiorari was extended by order of Mr. Justice Douglas to and including March 12, 1956 (R. 125). On February 17, 1956, the second petition for hearing was denied (R. 125). The petition for a writ of certiorari was filed on March 9, 1956, and was granted on April 23, 1956 (R. 126). 351 U. S. 905. The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether, under Washington law, the owner of the servient estate in a railroad right-of-way is under a duty to keep the right-of-way free of combustible matter or to guard against the improper use of the right-of-way by the railroad.

2. Whether, under Washington law, the alleged presence of combustible matter at the point of origin of the forest fire was the proximate cause of the damage.

3. Whether the United States is liable, under the Federal Tort Claims Act, on a claim for the allegedly negligent failure of the Forest Service to fight and extinguish a forest fire originating on a railroad right-of-way and spreading to neighboring public and private lands.

STATUTE INVOLVED

The relevant provisions of the Federal Tort Claims Act¹ and of the Revised Code of Washington are set forth in the Appendix, pp. 79-81, *infra*.

¹ The Federal Tort Claims Act was enacted as Title IV of the Legislative Reorganization Act of 1946, 60 Stat. 842, 28 U. S. C. 921, *et seq.* While subsequently repealed, its provisions were re-

STATEMENT

This is an action under the Federal Tort Claims Act to recover damages for property loss allegedly sustained as a result of a forest fire caused by a passing train of the Port Angeles Western Railroad and originating on the Railroad's right-of-way running through a national forest. The forest fire thereafter spread to neighboring public and private lands. The complaint asserts negligence on the part of the Government:

(1) in failing to require the Railroad to provide adequate spark arresters on its locomotives and to require the Railroad to follow-up its trains with speeders or other equipment with men to watch for fires caused by trains;

(2) in failing to require the Railroad to keep its right-of-way clear of inflammable materials; and

(3) in failing to extinguish the fires by utilizing insufficient manpower, tools, equipment, water, and supplies before the forest fire reached petitioner's property.

Both courts below held that petitioner's amended complaint failed to state a cause of action. The allegations of the complaint and the proceedings below may be summarized as follows:

1. *Allegations of fact in the amended complaint.* Petitioner is a Delaware corporation authorized to do

enacted into law, under the revision of the Judicial Code, as 28 U. S. C. 1291, 1346, 1402, 1504, 2110, 2402, 2411, 2412, 2671-2680, effective September 1, 1948 (62 Stat. 869, 992). Except for insignificant alterations in the language, the portions of the Act relevant to the instant suit remained unchanged

business in the State of Washington (R. 3-4). Its principal business is the manufacture of pulp and, in connection therewith, it owns extensive timber lands in the State of Washington as well as sundry facilities and equipment for use in logging operations (R. 4-5). Also, at the times relevant to this action, it was a party to two so-called "Timber Sales Contracts" with the Forest Service of the Department of Agriculture, under the terms of which it had the right and obligation to purchase and cut certain timber on public lands (R. 5). On September 20, 1951, there remained uncut timber which petitioner had the right and obligation to purchase under these contracts (R. 5).

The Olympic National Forest contains extensive timber lands, some of which are adjacent to or in the general vicinity of lands owned by petitioner (R. 5-6). These Government lands are administered by the Forest Service and a portion of the timber thereon is sold to private parties for commercial and industrial purposes (R. 6).

By agreement between the Forest Service and the State of Washington, a "Forest Service Protective Area" was established, embracing *inter alia* petitioner's lands and the above-mentioned Government lands (R. 6). The Forest Service agreed to protect the land within this area against fire and to take action in suppressing fires originating on or threatening the area (R. 6-7). Petitioner and other adjacent landowners were aware of the establishment of the Forest Service Protective Area and of the duties of the Forest Service pertaining thereto (R. 7).

The District Ranger of the Forest Service for the district in which this Forest Service Protective Area was located was Sanford Floe (R. 8). In the performance of their duties, Floe and his subordinates were supposed to inspect and patrol the lands within the Protective Area to discover, abate, and eliminate conditions which constituted fire hazards (R. 9). Further, when a fire occurred, they were supposed to supervise, direct, and control its suppression (R. 9). Floe was authorized to employ, rent, and use all men, equipment, tools, and materials he deemed necessary to accomplish these ends (R. 9). Also, he and his subordinates were fire wardens of the State of Washington and in such capacity had the authority to impress help in the prevention, suppression, and control of forest fires (R. 9-10).

It is further alleged that during 1951, and for several years prior thereto, the Port Angeles Western Railroad possessed a right-of-way across the public domain (R. 11). The locomotives and other equipment operated by the Railroad on the right-of-way were defective without adequate spark arresters, with the result that they emitted sparks (R. 11). The Railroad had also permitted its right-of-way to become covered with inflammable growing grasses and bushes and many of its track ties were rotten (R. 11-12). These conditions were, or should have been, known to Floe and could have been, but were not, abated by him prior to August 6, 1951 (R. 12). Floe had called to the Railroad's attention, however, its use of defective equipment and its failure to observe prescribed

fire prevention practices, and had requested the Railroad to correct those conditions (R. 12).

At approximately noon on August 6, 1951, sparks from a Port Angeles Western Railroad train crossing the public domain started fires on and in the vicinity of the right-of-way (R. 12). Shortly thereafter, Floe was notified of the fires, whereupon he and his subordinates immediately assumed exclusive supervision and control of the efforts to suppress them (R. 13-14). Petitioner knew that this supervision had been undertaken and relied upon its being continued (R. 14).

Between August 7 and August 11, 1951, the fires spread over approximately 1,600 acres of land (R. 15). By the latter date, it was brought under control and thereafter remained contained within the 1,600 acre area until the morning of September 20, 1951 (R. 15). During this period, the fire and all burning material could have been completely extinguished had Floe employed more available men and equipment (R. 25). On September 20, 1951, a northeasterly wind of not unusual force carried sparks and other burning matter from within the area to lands to the west and south (R. 24). New fires started and spread rapidly in various directions, destroying or damaging facilities of petitioner and timber on the public domain which petitioner was entitled to cut under its Timber Sales Contracts with the Forest Service (R. 24, 30-31).

It is alleged that the spread of the fire on September 20, as well as the resultant damage to petitioner's

property, was attributable to the negligence of Floe and his subordinates in the conduct of their fire-fighting activities (R. 29). In broad outline, this negligence consisted of the failure at various stages to dispatch and utilize sufficient men and equipment at their disposal; the failure to maintain proper fire patrols and look-outs; the failure to take appropriate action in the light of weather conditions and weather forecasts; the failure to discover and extinguish between August 11, 1951, and September 19, 1951, all fires and burning matter in the 1,600 acre area; and the failure to carry out a Fire Suppression Plan which previously had been adopted by the Supervisor of the Olympic National Forest (R. 27-29).

2. *Proceedings in the courts below.* On February 19, 1954, the amended complaint was filed (R. 3-35). On February 27, 1954, the United States made an oral motion to dismiss the complaint on the grounds that it failed to state a cause of action and that the District Court lacked jurisdiction over the subject matter (R. 48-49). After a hearing (R. 48-65), the District Court granted the motion on the former ground and, on March 1, 1954, an order was entered dismissing the cause with prejudice (R. 66-67).

The Court of Appeals affirmed. With respect to the alleged failure of the Forest Service to keep the railroad right-of-way clear of inflammable matter, the court held (1) this was not the proximate cause of the damage complained of (R. 80-81), and (2) assuming the truth of petitioner's allegations, the Government was not guilty of actionable negligence

(R. 84-87). With respect to the alleged negligence of the Forest Service in fighting the fire, the court determined (1) the Forest Service was acting in the capacity of a public fireman, and (2) as a consequence, the claim was barred by this Court's holding in *Dalehite v. United States*, 346 U. S. 15, 43-44 (R. 82-84).

SUMMARY OF ARGUMENT

In this action petitioner endeavors to invoke the Tort Claims Act to recover damages for property loss which it allegedly sustained as a result of a forest fire in the Olympic National Forest. This fire was concededly started by a negligently operated locomotive of a privately owned Railroad, while the locomotive was proceeding on the Railroad's improperly maintained right-of-way across the National Forest. The fire was fought on the private and public lands, to which it then spread, by the Forest Service of the Department of Agriculture pursuant to a cooperative fire protection agreement which the Service had entered into with the State of Washington. The District Court and the Court of Appeals, relying upon traditional tort principles and the decision of this Court in *Dalehite v. United States*, 346 U. S. 15, held that petitioner's complaint does not state a cause of action against the United States. This holding, we submit, is wholly correct.

I

A. Pointing to the assertion in the complaint that, at the place of origin of the fire on the Railroad right-

of-way, the right-of-way crossed the public domain, petitioner contends that the United States was under a landowner's duty to keep the right-of-way free from combustible matter and to require the Railroad to observe customary safety precautions in operation of its trains thereon. From its premise of the existence of such a duty, petitioner proceeds to the conclusion that the Government is to be held responsible to it for the Railroad's derelictions which occasioned the fire.

This reasoning is based on a total misunderstanding of the nature of the Railroad's interest in its right-of-way and the legal duties concomitant with that interest. The Railroad possessed at least an easement in the right-of-way. Consequently, any common law or statutory obligation to maintain the right-of-way in such fashion as to avoid damage to others rested upon it alone and not, as petitioner asserts, upon the United States—which, as to the surface, possessed nothing more than a reversionary interest on cessation of use of the premises for railroad purposes. This follows from the long standing principle, accepted universally, that, in the absence of a contractual stipulation to the contrary (and here there was none), the holder of the servient estate in an easement is under no obligation to third parties to maintain the easement in good condition. This rule, the force of which in the State of Washington has not been altered or affected to any extent by the legislative enactments upon which petitioner relies, is fully applicable to railroad easements. There is not a single decision in any jurisdiction imposing liability upon

the owner of the fee title in the ground beneath a right-of-way for damage resulting from the failure of the railroad either to remove combustibles from the surface or to operate its trains safely.

The court below correctly held that the fact that the United States allegedly reserved the right to enter upon the right-of-way, and to require the Railroad to remove combustibles therefrom, does not provide an exception to the settled rule. This reservation was admittedly not coupled with an undertaking by the Government to abate fire hazards or even to assume a duty of inspection of the right-of-way. Rather, its effect was simply to afford the Government, for its own benefit, the opportunity to ascertain the manner in which the Railroad conducted its affairs on the easement. As such, petitioner can not claim the benefit of the reservation; if petitioner has been damaged because of the condition or use made of the right-of-way by the Railroad, it still must look solely to the Railroad for redress.

B. Petitioner's assertion that liability may be imposed upon the United States because of the asserted presence of combustibles on the public domain adjoining the right-of-way is similarly without substance. A landowner owes no duty to conform the use of his property to the possibility that some act of negligence on the part of a third person will start a fire on adjoining land which is in the possession, and thus is the responsibility, of that third person. This principle, too, has been applied consistently in cases involving, as does this one, fires which are started by rail-

road locomotives and then spread to neighboring lands on which combustible matter is present. And no Washington statute, either by its terms or as judicially construed, has the effect of modifying the common law in this respect.

C. Apart from the fact that the purported presence of combustibles on and about the right-of-way did not constitute a breach of any duty owing this petitioner by the United States, these combustibles were not the proximate cause of the damage. According to the complaint, the fire was contained within a 1,600 acre area for over one month following its ignition on the right-of-way. The loss to petitioner resulted only when, assertedly due to the negligent failure of the Forest Service to suppress the fire while thus contained, it thereafter spread to petitioner's property. Moreover, with regard to the alleged slashings on the public domain, it is nowhere asserted in the complaint that any fires originated in these slashings or that they had any effect whatsoever upon the spread of the fire.

II

Petitioner advances as an additional basis for recovery the alleged failure of the Forest Service to fight the fire properly. In *Dalehite v. United States*, 346 U. S. 15, this Court held that claims of this character are not cognizable under the Tort Claims Act. The *Dalehite* holding represents a correct interpretation of the Act and traditional tort law and is controlling here.

A. As the court below determined, the endeavors of the Forest Service to extinguish the fire on public and private lands alike, after it had originated on the right-of-way, was undertaken in the capacity of a public fireman—and not, as petitioner suggests, in pursuance of a special duty imposed upon landowners under local law. For one thing, petitioner's complaint itself notes that the fire fighting activities of the Forest Service were conducted under a cooperative agreement with the State of Washington. By this agreement, the Service assumed the task of suppressing fires on all lands within a particular area (whether federally owned or not) and, in the furtherance of this end, its rangers were clothed with the duties and privileges of state forest wardens, including the right to conscript and impress men and equipment for fire suppression. Undertakings of this kind are a part of the participation of the Forest Service, under express Congressional authorization, in the nationwide effort of Federal, state, and local authorities to prevent and suppress forest fires.

Secondly, in Washington, as elsewhere, the courts have continually emphasized that the special common law and statutory fire fighting duties imposed upon the landowner, to which petitioner makes reference, are confined to situations where the fire originates on his own land. And, in the application of this limitation, it is accepted that a railroad right-of-way is the property of the railroad. While there are innumerable cases holding railroads liable for the failure to prevent the spread of a fire developing on their rights-of-way,

there has never been a single occasion in which the adjoining landowner has been held similarly accountable.

B. 1. In *Dalehite v. United States*, 346 U. S. 15, this Court held that, under the Tort Claims Act, the United States is not liable for claims grounded upon the alleged failure of public firemen to extinguish a fire. Observing that the "Act did not create new causes of action where none existed before", the Court applied the "normal rule that an alleged failure or carelessness of public firemen does not create private actionable rights".

2. It is clear, as this Court ruled in *Dalehite*, that to hold actionable under the Tort Act the alleged failure of public firefighters to extinguish a fire which was not started by Government employees—or on Government property—would be to visit the United States with a novel and unprecedented liability. Every American decision on this question is to the effect that claims based upon such a failure are not cognizable. Additionally, there has been a similar uniform rejection of claims rooted in the assertedly negligent failure of a city to perform its assumed duty of providing sufficient water for fire protection. And, petitioner to the contrary notwithstanding, these decisions do not rest upon considerations of sovereign immunity. Rather, underlying the vast majority of them is the recognition that fire protection is provided as an incident of government for the benefit of the public as a whole and, as a consequence, does not give rise to actionable rights in individual members of

the public who may deem themselves to have been aggrieved by the failure of the undertaking to accomplish fully its intended objective.

3. Further indication that the fire fighting holding in *Dalehite* did not rest upon principles of sovereign immunity, and at the same time the complete answer to petitioner's argument that tort liability may be imposed upon the United States because of the contract between the Forest Service and the State of Washington, is found in the cases dealing with the liability of *private* water companies for fire loss allegedly stemming from their negligent failure to perform properly their contracts with municipalities to furnish water for fire protection. These companies have never enjoyed sovereign immunity to any extent. Yet in all but three jurisdictions, where liability is imposed on a contractual basis, they are held not accountable for such loss to individual citizens. The decision of this Court in *German Alliance Insurance Co. v. Home Water Supply Co.*, 226 U. S. 220, and that of the New York Court of Appeals in *Moch v. Rensselaer Water Co.*, 247 N. Y. 160, indicate that the basic reason is little different from that at the foundation of the rule barring suits against municipalities—namely that, while by its contract with the city to provide some of the means for fire protection the water company assumes an obligation to the citizenry as a whole, it does not incur at the same time an actionable duty to individual members thereof. In the *Moch* case, Judge Cardozo expressly rejected the application to such situations of the “good Samaritan” principle, which he had previously laid down in *Glanzer v. Shepard*, 223 N. Y. 236.

4. Still further evidence that the long-standing rule referred to by the Court in *Dalehite* is grounded upon considerations far removed from sovereign immunity is contained in the New York decisions in this area since the enactment of the Court of Claims Act of that State in 1929. By that Act, New York waived its immunity in tort and subjected itself and its political subdivisions to the same liability as is imposed on private individuals for their negligent acts or omissions. But, as is reflected by *Hughes v. State*, 252 App. Div. 263, and *Steitz v. City of Beacon*, 295 N. Y. 51, both of which were decided subsequent to 1929, it is still settled law in New York that the alleged failure of a public fireman to extinguish a fire not originated by a public body does not give rise to private actionable rights.

5. Petitioner's reliance on *Indian Towing Co. v. United States*, 350 U. S. 61, is misplaced. In that case, this Court decided that a claim grounded upon alleged negligence in the maintenance of a Coast Guard navigational aid was within the purview of the Tort Act, noting that "it is hornbook tort law that one who undertakes to warn the public of danger and thereby induces reliance must perform his 'good Samaritan' task in a careful manner". In so holding, however, the Court did not purport to disturb *Dalehite*; to the contrary, *Dalehite* was expressly distinguished on the ground that it involved a claim based on negligence in connection with fire fighting. The basis for this distinction, and thus the error in petitioner's contention that the United States is liable here as a volunteer, is plain. In addition to Judge Cardozo's explicit rejection of the "good Samaritan"

principle in the *Moch* case, there was perforce the same recognition of the inapplicability of the principle in the other cases which, without dissent, hold that neither governmental bodies nor private persons undertaking by contract (or otherwise) to furnish some facet of fire protection are liable as volunteers to members of the public for the imperfect fulfillment of that undertaking. In the final analysis, petitioner asks this Court to hold that the Tort Claims Act does much more than waive the prior sovereign immunity in tort—that it also involves the assumption by the Government of actionable fire protection and suppression duties and liabilities which, both as to governmental units and private individuals, are completely unknown in American jurisprudence.

ARGUMENT

By this action, petitioner seeks to impose liability upon the United States under the Tort Claims Act for alleged damage arising from a forest fire which (1) concededly was set by a negligently operated Port Angeles Western Railroad locomotive on the Railroad's negligently maintained right-of-way across the Olympic National Forest, and (2) was fought by the Forest Service on private and public lands alike. Both courts below have held that petitioner's claim fails to state a cause of action against the United States. We submit that this conclusion—viewed in terms of the statutory and common law duties of a private landowner in the State of Washington and of the Government's waiver of immunity from suit in the Tort Claims Act—is entirely correct.

For convenience, we treat petitioner's claim in the two separate parts into which it falls: (1) the Gov-

ernment's alleged liability for the presence of combustible material on and near the Railroad's right-of-way, and (2) the Government's alleged liability for the negligence of the Forest Service in fighting the fire.

I

UNDER WASHINGTON LAW, THE UNITED STATES IS NOT
 LIABLE TO PETITIONER FOR THE ALLEGED PRESENCE OF
 COMBUSTIBLE MATTER ON AND IN THE VICINITY OF THE
 RAILROAD RIGHT-OF-WAY

A. THE DUTY OF MAINTAINING THE RIGHT-OF-WAY RESTED SOLELY UPON THE RAILROAD

It is not disputed that the forest fire occasioning the damage of which petitioner complains was caused by the ignition of combustible material on the right-of-way maintained by the Port Angeles Western Railroad across the Olympic National Forest.¹⁰ It is also unchallenged that the ignition resulted from a spark from a steam locomotive owned and operated by the Railroad. Petitioner urges, however, that, by reason of its ownership of the national forest, the United

¹⁰ Petitioner's amended complaint (R. 12) ambiguously alleges that the fires "occurred on and in the vicinity of" the right-of-way. It will be noted that there is no explicit allegation that any fires originated on the public domain beyond the right-of-way. The Court of Appeals interpreted the amended complaint as alleging that the sparks from the Railroad's locomotive settled within the Railroad's 100-foot right-of-way, and neither petitioner's briefs nor its two petitions for rehearing below contended otherwise. The fourth amended complaint in the companion case, *Arnhold v. United States* (No. 47) alleges (R. 6) that the Railroad's locomotive "threw sparks and fire into the dry grass, combustible herbage and rotten ties both in and near the tracks, causing the same to become ignited in at least six places * * *" (emphasis added). Petitioners' brief in the *Arnhold* case likewise treats the fires as originating on the right-of-way.

States was charged with the responsibility of keeping the railroad right-of-way clear of combustible matter. From this premise, petitioner proceeds to the conclusion that, by failing to abate the fire hazard which the Railroad created and continued in violation of both the common law and Washington statutes, the Government itself became answerable under the Tort Claims Act for the consequences of any fire resulting from the Railroad's negligent operations on the right-of-way.

The difficulty with this line of reasoning lies in the invalidity of the premise that the United States owed a duty to this petitioner in respect to the right-of-way. This in turn stems from a misconception of the nature of the Railroad's interest in the right-of-way and the legal duties concomitant with that interest.

1. (a) A proper appraisal of the Railroad's interest and duties requires a somewhat detailed history of the right-of-way. The records of the Department of Interior reflect that the Port Angeles Western Railroad was built in 1918 and 1919 by the United States Spruce Corporation, a wholly owned government corporation formed at the direction of the Director of Aircraft Production, pursuant to the authority conferred by Chapter XVI of the Act of July 9, 1918, c. 143, 40 Stat. 845, 888. In large measure the roadbed traversed lands which were then a part of the public domain. Its construction across those lands was accomplished under a special use permit issued by the Secretary of Agriculture.

In the area referred to in petitioner's complaint (R. 11), however, a part of the railroad was built on the property of Clallam Lumber Company. In a warranty deed executed in December 1918, Clallam

granted a railroad right-of-way, 100 feet in width, to the Siems, Carey-H. S. Kerbaugh Corporation; the latter, its successors and assigns were "to have and to hold the same, with the tenements, hereditaments, and appurtenances * * * forever".² By a second warranty deed, executed in March 1919, the Kerbaugh Corporation assigned its entire interest in the right-of-way to the United States Spruce Corporation.³

In 1922, the Spruce Corporation, in the course of liquidation, contracted for the sale of its railroad properties to a group of private individuals and, in 1925, the vendees under that contract organized the Port Angeles Western Railroad and transferred their interest to it.

On May 3, 1938, the Port Angeles Western Railroad filed a formal application with the Department of Interior for the grant to it of a permanent right-of-way for that portion of the railroad which crossed government-owned land. Submitted with the application were documents required by the Right of Way Act of March 3, 1875, 18 Stat. 482, 43 U. S. C. 934, and the regulations promulgated by the Department of Interior thereunder.⁴ On September 18, 1939, Assistant

² This deed is recorded in Volume 102 of the deed records of Clallam County, Washington, at p. 108.

³ This deed is recorded in Volume 102 of the deed records of Clallam County, Washington, at p. 280.

⁴ The Right-of-Way Act, which was designed to aid in the expansion of railroad and telegraph facilities, provides that:

"The right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any State or Territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each

Secretary of Interior Chapman, making specific reference to the Right of Way Act, approved the application.

In 1940, the Clallam Lumber Company transferred to the United States the parcels of its lands through which the right-of-way passed in exchange for certain timber rights. Each of the three deeds which evidenced this transaction in terms excepted the right-of-way from the grant and also, doubtless out of an abundance of caution, provided that the grant to the United States was made subject to any existing railroad rights-of-way.⁵

(b) Under Washington law, the Port Angeles Western Railroad enjoyed, at the very least, an easement in that portion of the right-of-way which was granted in the first instance by the Clallam Lumber Company, and which was excepted from the 1940 grant of the underlying fee by the Lumber Company to the United States. See *Pacific Iron Works v. Bryant Lumber and Shingle Mill Co.*, 60 Wash. 502, 111 Pac. 578; *Morsbach v. Thurston Co.*, 152 Wash. 562, 278 Pac. 686; *Swan v. O'Leary*, 37 Wash. 2d 533, 225 P. 2d 199. And the question of the extent of a railroad's

side of the central line of said road; also the right to take, from the public lands adjacent to the line of said roads, material, earth, stone, and timber necessary for the construction of said railroad; also ground adjacent to such right of way for station-buildings, depots, machine shops, side-tracks, turn-outs, and water-stations, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road."

⁵ These deeds are recorded at the following places in the deed records of Clallam County, Washington: Volume 127, p. 337; Volume 134, p. 261; Volume 135, p. 331.

interest in a right-of-way granted under the 1875 Act has been considered by this Court on several occasions, most recently in *Great Northern Ry. Co. v. United States*, 315 U. S. 262. In the *Great Northern* case the Court, after a reference to the legislative history of the Act, its early administrative interpretation and the construction placed upon it by Congress in subsequent enactments, held unequivocally that railroads enjoy an easement in their rights-of-way on public lands. This holding was followed by the Tenth Circuit in *Himonas v. Denver & R. G. W. R. Co.*, 179 F. 2d 171.

The present administrative construction of the character of the grant under the Right of Way Act fully accords with the judicial review. The regulations of the Department of Interior pertaining to rights-of-way advise railroads that, while they do not possess a full and complete title to the land over which the right-of-way is located, they do enjoy the right to use the land for the purposes for which the grant was made and may hold possession for as long as that use continues. The regulations give further assurance that, if the Government conveys the fee simple title, the patentee will take subject to the railroad's right of use and possession. And persons settling on a tract of public land also take subject to any existing right-of-way. See 43 C. F. R. (1949 ed.) 243.2.

2. Since the Port Angeles Western Railroad was the possessor of an easement as to the land upon which it maintained its right-of-way—both that granted by the Government and that originally ac-

corded by the Clallam Lumber Company—the United States was under no common law obligation to maintain, repair, or otherwise keep it in good condition. It is settled that, in the absence of a contract specifying the duties and obligations of the dominant and servient owners with respect to the easement, the holder of the servient estate is under no obligation, either to the dominant owner or a third party, to make repairs. Instead, “the duty is upon the one who enjoys the easement to keep it in proper condition, and, if he fails to do so and injury to third persons results, he alone is liable.” *Reed v. Allegheny County*, 330 Pa. 300, 303, 199 Atl. 187. See also *Herzog v. Grosso*, 41 Cal. 2d 219, 259 P. 2d 429; *Strauss v. Thompson*, 175 Kan. 98, 259 P. 2d 145; *City of Bellevue v. Daly*, 14 Idaho 545, 549, 94 Pac. 1036; *Hastings v. Chi. R. I. & P. Ry. Co.*, 148 Iowa 390, 126 N. W. 786; *Herman v. Roberts*, 119 N. Y. 37, 23 N. E. 442; *Greenfarb v. R. S. K. Realty Corp.*, 256 N. Y. 130, 175 N. E. 649; *Wells v. North East Coal Co.*, 274 Ky. 268, 118 S. W. 2d 555; *Reiver v. Voshell*, 18 Del. Ch. 260, 158 Atl. 366; *Dodds v. St. Louis Union Trust Co.*, 205 N. C. 153, 170 S. E. 652; *Schuricht v. Hammen*, 221 Mo. App. 389, 277 S. W. 944; 2 *American Law of Property*, § 8.66; *Jones on Easements* (1898), § 831.

Thus, if there is substance to the allegations in petitioner's complaint regarding the condition of the right-of-way, it was the Railroad alone that breached a common law duty. To maintain a right-of-way in proper condition is, among other things, to keep it free of fire hazards. And where the Railroad fails

to do so, and a fire is started on the right-of-way by sparks from one of its locomotives, Washington law makes it unmistakably clear that it is accountable for any resultant damage to adjoining property. This is true even if, as apparently was not the case here, there is no negligence of the Railroad in equipping and operating the engine. See, *e. g.*, *Abrams v. Seattle & M. R. Co.*, 27 Wash. 507, 68 Pac. 78; *Fireman's Fund Ins. Co. v. Northern Pacific R. Co.*, 46 Wash. 635, 91 Pac. 13; *Slaton v. C., M. & St. P. R. R. Co.*, 97 Wash. 441, 166 Pac. 644. Cf. *Eddy v. LaFayette*, 163 U. S. 456.

The Washington rule is of course not unique. In virtually every jurisdiction, the failure to keep its right-of-way clear of combustible matter will render the railroad liable for damage resulting from the ignition of the matter by sparks from a locomotive. See cases cited 18 A. L. R. 2d 1090, *et seq.*, 42 A. L. R. 799, *et seq.* We know of no occasion—and petitioner points to none—where in similar circumstances liability was additionally imposed upon the possessor of the servient estate, *i. e.*, the owner of the ground beneath the right-of-way.

3. The court below correctly held that the fact that the United States may have, in its grant to the Railroad, reserved the right to enter upon the premises, or to require the Railroad to remove combustibles from the right-of-way, does not dilute the applicability of the legal principles discussed above. As petitioner's complaint tacitly concedes, the reservation did not contain an agreement by the Government to assume

the Railroad's responsibility as holder of the easement to abate fire hazards and generally keep the property in good order. And such an agreement is an absolute condition precedent to imposing common law liability upon the servient rather than the dominant owner for injury resulting from faulty maintenance of an easement.

The motivation behind the reservation of a right of entry is not difficult to envisage. The easement having been granted for the limited purpose of use as a railroad right-of-way, the Government should be in a position to insure that no other and unauthorized use is being made of it. Cf. *Great Northern R. Co. v. United States*, *supra*.⁶ Additionally, because a failure of the Railroad to take adequate safety precautions in the operation of its trains and the maintenance of the right-of-way might adversely affect the adjoining forest lands owned by the United States, the Government understandably desired, for its own benefit, the opportunity to ascertain the manner in which the Railroad conducted its affairs on the easement.

The short of the matter is that the right of entry, admittedly not coupled with an undertaking to abate fire hazards or even an agreement to assume a duty of inspection of the right-of-way, is simply for the protection of the owner of the servient estate. As such,

⁶ In the *Great Northern* case, the United States sought to enjoin the railroad from drilling or removing oil, gas or minerals underlying its right-of-way. This Court ruled that the Great Northern easement for railroad purposes did not confer rights to materials below the surface of the right-of-way.

petitioner cannot claim the benefit of it; nor does it disturb the force of the normal rule that third persons must look to the owner of the dominant estate if the condition or use of that estate causes harm to them. Cf. *The Dalles City v. River Terminals Co.*, 226 F. 2d 100, 103 (C. A. 9); *Burke v. Ireland*, 26 App. Div. 487, 50 N. Y. S. 369, 373.'

4. Because the Railroad right-of-way crosses the Olympic National Forest, petitioner also urges that the United States was under a special statutory duty to keep the right-of-way clear of inflammable growing grasses and bushes and to abate any hazard thereon. In this connection, it points principally to Sections 5807 and 5818 of the Revised Statutes of the State of Washington (R. C. W. §§ 76.04.370, 76.04.450), *infra*, pp. 80-81.* The former (Sec. 5807) provides

'The foregoing discussion is equally applicable to the allegations of petitioner's complaint—not stressed in its brief here or in the court below—with respect to the failure of the Railroad to equip its locomotives with adequate spark arresters (R. 11). Neither as the possessor of the servient estate in the right-of-way, nor by reason of any reservation of a right-of-entry, did the Government assume a duty to petitioner to require the Railroad to conduct its operations in any particular fashion. If, in fact, the equipment on the locomotives did not meet the standards imposed by law, and petitioner deemed its property to be endangered thereby, it was petitioner's right as well as obligation, for its own protection, to institute the necessary procedures to compel the Railroad's compliance with all legal requirements. Not having done so, petitioner is hardly in a position to complain that the Forest Service had failed to exercise the similar right that the Government possessed in the interest of protecting the public domain.

* Petitioner makes passing references to certain other sections of the Revised Statutes in the body of its brief, and sets forth

that land covered by inflammable debris shall constitute a fire hazard and requires the owner and the person, firm or corporation responsible for the existence of the hazard to abate it. Section 5818 declares it unlawful for any firm, person, company or corporation to do or commit any act which shall expose the forest or timber of the Olympic Peninsula to the hazard of fire. Neither statute is applicable here.

(a) Since it is not alleged that the Government committed any act upon the Railroad's right-of-way which exposed the forest to the purported fire hazard thereon, Section 5818 is, by its terms, inapplicable; and the specific wording of the Section certainly does not impose any duty upon the Government of inspecting or maintaining the right-of-way if such a duty were otherwise absent.

Insofar as Section 5807 is concerned, we submit that there is no merit to petitioner's contention that it gives rise to an obligation upon the part of the owner of a servient estate to keep a railroad right-of-way running across his property free of combustible matter. What petitioner's position amounts to is that, without expressly so stating, Section 5807 drastically changes the common law so as to impose upon a servient owner civil liability for the act or omissions of the owner of the dominant estate. Indeed, its theory goes much further than

a large number of additional sections in the Appendix. With a single exception (see fn. 30, *infra*, p. 48), their lack of materiality to the alleged facts of this case is sufficiently clear, we think, to obviate the need to discuss them.

that. Section 5807 is a criminal statute.* Consequently, under petitioner's construction, a servient owner would be held criminally responsible for statutory violations upon the part of the dominant owner, even though, unlike a landlord-lessor, the former, in the absence of a contractual stipulation to the contrary, has no duties with respect to the easement except the negative one of not interfering with the latter's use. See, *e. g.*, *Bina v. Bina*, 213 Iowa 432, 239 N. W. 68; *Herman v. Roberts*, 119 N. Y. 37, 23 N. E. 442; *Moffett v. Berlin Water Co.*, 81 N. H. 79, 121 Atl. 22; *Jones on Easements* (1898), § 831. This consideration alone, we think, sufficiently explains the inability of petitioner to point to a single judicial decision, either in Washington or elsewhere, which reads the term "owner" in a safety statute of this character as encompassing the holder of the servient estate in a railroad right-of-way.

There are additional compelling reasons why the scope of the term "owner" in Section 5807 is properly limited to persons entitled to present possession—whether or not that possession has been alienated under a lease, license, or similar agreement. If, for example, the United States, by virtue of its two incidents of ownership of the land constituting the right-of-way (*i. e.*, a reversionary interest on cessation of use of the right-of-way for railroad purposes and a right to prevent the railroad from using it for other than such purposes), is to be held accountable as

* The violation of certain sections of Title 36 of the Washington Revised Statutes, including Section 5807, constitutes a misdemeanor. See Section 5821 (R. C. W. § 76.04.480).

"owner" here, it would seem to follow that any holder of (a) a right of entry for condition broken, (b) a reversionary interest, or (c) a contingent or vested remainder in forest land would similarly be an "owner" and liable for violations of the statute by the party in possession. Such a result would not only be absurd but also would plainly conflict with the established principle, followed in Washington, that a criminal statute is to be strictly construed. See, *e. g.*, *State v. Furth*, 82 Wash. 665, 678, 144 Pac. 907; *State v. Levy*, 8 Wash. 2d 630, 651, 113 P. 2d 306. Moreover, while there may be justification for holding a lessor of timber lands accountable for fire hazards created by his lessee, the same cannot be said with respect to the servient owner of land under a railroad easement. In the first place, it is equitable that the lessor, who directly benefits through rent from the forest operations of the lessee on his land which gave rise to the hazard, share in the responsibility for elimination of the hazard. Secondly, the typical lease or license agreement is one for a defined limited period of time, at the conclusion of which possession of the land reverts to the owner. Consequently, the lessor out of possession will never be confronted with the necessity of assuming *in perpetuity* the burden of policing another's activities.

The situation is entirely different where possession of land is taken under the grant of an easement, especially where the easement is in the nature of a railroad right-of-way. The dominant owner, much like the owner of a determinable fee, takes possession *in perpetuity*, "to have and to hold" so long as the easement is used for the purpose granted. See pp. 19, 21,

supra. This means that the servient owner and his successors in interest, if Section 5807 were applicable to them, would have an uninterrupted responsibility for the condition of the surface of land of which, in all likelihood, they will never regain possession and from which, at the same time, they stand to derive no direct and real benefit. Indeed, it might be that the only action available to a servient holder, who might find the terms of his grant violated by the dominant owner of the easement, is a suit for injunction or termination and ejectment.

We think that it would take much more than Section 5807 as it now stands to attribute any such intent to the legislature. And even if petitioner's construction of the statute were reasonable, in view of the absence of any Washington decisions adopting it—and of the presence on the panel which heard the appeal of an experienced judge from that jurisdiction¹⁰—petitioner can hardly complain here of the refusal of the court below to subscribe to it. Cf. *MacGregor v. State Mutual Co.*, 315 U. S. 280; *Propper v. Clark*, 337 U. S. 472, 486-487; *Estate of Spiegel v. Commissioner*, 335 U. S. 701, 707-708; *Helvering v. Stuart*, 317 U. S. 154, 164.

(b) Were Section 5807 to be construed as rendering the holder of the servient estate in a railroad ease-

¹⁰ The Ninth Circuit panel consisted of Judges Bone, Orr and Hastie. Judge Bone was admitted to the Washington bar in 1911. Between that year and his election to the United States Senate in 1932, he practiced law in Tacoma, Washington, held several municipal offices and served in the state legislature. See *The National Cyclopaedia of American Biography*, Volume F (1939-1942), p. 489. He was appointed to the Ninth Circuit in 1944.

ment absolutely liable for the presence of fire hazards on the easement—because of his limited ownership alone and irrespective of whether he or his employees had any part in the creation of those hazards—that statute still could not be invoked by this petitioner. The Tort Claims Act is not an unqualified waiver of immunity in tort. The United States has consented to be sued under the Act only for “the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment.” 28 U. S. C. 1346 (b), *infra*, p. 79. This jurisdictional language incorporates into the Act the common law test of *respondeat superior* for the purpose of determining the tort liability of the United States. *Williams v. United States*, 350 U. S. 857; *United States v. Campbell*, 172 F. 2d 500, 503 (C. A. 5), certiorari denied, 337 U. S. 957; *United States v. Eleazer*, 177 F. 2d 914, 918 (C. A. 4), certiorari denied, 339 U. S. 903; *National Manufacturing Co. v. United States*, 210 F. 2d 263 (C. A. 8), certiorari denied, 347 U. S. 967. And this, in turn, means, as this Court held in *Dalehite v. United States*, 346 U. S. 15, 44–45, that the waiver of immunity does not extend to situations where the claim is grounded upon either a statute or common law doctrine which imposes absolute liability without fault. See, also, *Heale v. United States*, 207 F. 2d 414 (C. A. 3); *United States v. Inmon*, 205 F. 2d 681, 684 (C. A. 5); *Harris v. United States*, 205 F. 2d 765, 767 (C. A. 10). Cf. *United States v. Hull*, 195 F. 2d 64, 67 (C. A. 1).¹¹

¹¹ As petitioner notes (Pet. Br. pp. 69–72), absolute liability was imposed under the Act by the Fourth Circuit in *United*

B. THE UNITED STATES WAS UNDER NO DUTY TO PETITIONER TO ANTICIPATE THE MISCONDUCT OF THE RAILROAD IN THE USE OF THE RIGHT-OF-WAY AND TO CLEAR THE ADJOINING GOVERNMENT LANDS

In addition to the allegations concerning the combustible matter on the Railroad right-of-way, petitioner's complaint asserts that there were inflammable materials¹² on forest lands of the public domain adjoining the right-of-way (R. 11-12). While the com-

States v. Praylou, 208 F. 2d 291, certiorari denied, 347 U. S. 934. We submit that *Praylou* (which was based in large measure on the same court's pre-*Dalehite* decision in *D'Anna v. United States*, 181 F. 2d 335) is in irreconcilable conflict with *Dalehite* and is wrong. In any event, the decision appears to rest on special characteristics of airplane accidents.

Petitioner's reliance on *State of Washington v. Canyon Lumber Corp.*, 46 Wash. 2d 701, 284 P. 2d 316, is entirely misplaced. The Supreme Court of Washington there read Section 5807 as applying only to those who, unlike the Government with respect to the right-of-way here, have possession of the land on which the combustibles were allegedly present. The issue in *Canyon Lumber* was whether the provisions of the Section permitting the state to recover the cost of fighting fires on land containing combustibles were in violation of the due process clauses of the federal and Washington Constitutions. In finding no constitutional objection, the court did not consider, let alone decide, the questions which were before the court below, viz: (1) whether Section 5807 confers actionable rights on third parties for fire loss, apart from and beyond their rights under the common law; (2) whether, if so, the Section has the effect of imposing absolute liability in the non-constitutional sense in which that term was employed in *Dalehite*; and (3) whether, in any event, the Section looks to the imposition of the *respondent superior* type of liability to which the Tort Claims Act is restricted.

¹² "[T]rees of various sizes, both standing and down, accumulations of rotten ties, logging and land clearing debris, inflammable growing grasses and bushes * * *."

plaint does not assert that this alleged fire hazard was created by Government employees, petitioner contends that the mere presence of this material calls for the imposition of liability upon the United States for the damage done to petitioner's property by the fire which the Railroad negligently started on the right-of-way. We submit that, as the court below held, this contention is likewise without merit.

1. It was held at common law that a landowner had an almost unlimited right to use his property as he saw fit. See, *e. g.*, cases cited in 12 L. R. A. (N. S.) 624. This meant that a owner might store inflammable material on his land without incurring liability for the spread of a fire from adjoining land through the material onto other adjoining land. See, *e. g.*, *Bowers v. East Tennessee & W. N. C. R. Co.*, 144 N. C. 684, 57 S. E. 453. It similarly meant that a railroad which negligently had set fire to inflammable matter on neighboring property could not plead the presence of the matter as contributory negligence.

This is well illustrated by *Leroy Fibre Co. v. Chi., Mil. & St. P. Ry.*, 232 U. S. 340. There, suit was brought against the railroad to recover for the destruction of inflammable flax straw which had been stacked on the plaintiff's property adjacent to the right-of-way and which had become ignited by a spark from a railroad locomotive. One of the questions certified to this Court was whether it was for the jury to decide if the plaintiff was held to the exercise of reasonable care to protect the straw from a fire set by the negligence of the railroad. The Court held that

it was not, observing that the Fibre Company was under no duty to conform its use of its own property to the possibility of wrongful acts by the railroad on the right-of-way.

It is true that in recent years some jurisdictions have modified the common law rule. There is current authority for the view that a landowner is responsible for damage to adjoining land from a fire *originating in combustibles on his property*, even if the fire started as the result of a negligent act of a trespasser on the property. Thus, in *Prince v. Chelalis Savings & Loan Association*, 186 Wash. 372, 58 P. 2d 290, affirmed on rehearing, 186 Wash. 377, 61 P. 2d 1374, the defendant was held liable for the spread of a fire starting in his abandoned garage, where the garage was left in a state of disrepair and was used at night by itinerants. And, in *Arneil v. Schnitzer*, 173 Ore. 179, 144 P. 2d 707, the same result was obtained where owners of a sawmill allowed inflammable debris to accumulate and an itinerant, entering upon the property, discarded a lighted cigarette in the vicinity of the debris.

There was no suggestion in these cases of a further and drastic modification of the common law to impose liability where the acts of negligence causing ignition of the combustibles take place on adjoining lands (such as the railroad right-of-way here) which are in the possession, and thus are the responsibility, of a third person.¹³ And while the Washington courts have not

¹³ Nor was there any such suggestion in the cases cited by petitioner on page 56 of its brief, with the possible exception of *Riley*

been confronted squarely with that question, it has been considered recently in California. In that jurisdiction, a landowner remains under no duty, in the use of his property, to guard against the possibility of negligence by a railroad in the operation of its trains on a nearby right-of-way. See *Atlas Assurance Co. Ltd. v. State*, 102 Cal. App. 2d 789, 229 P. 2d 13, 17, 19. Cf. *Kleinclaus v. Marin Realty Co.*, 94 Cal. App. 2d 733, 211 P. 2d 582, 583-584. We know of no holding in any jurisdiction to the contrary."

v. Standard Oil Co. of Indiana, 214 Wis. 15, 252 N. W. 183, where, as the court below observed (R. 86), "the point in question was assumed by the court without reference to authorities or arguments." In *Keyser Canning Co. v. Klots Throwing Co.*, 94 W. Va. 346, 118 S. E. 521, for example, plaintiff and defendant were both lessees of portions of the same building. Because of the negligence of the latter, a fire started in the portion under lease to it and destroyed the entire building. Similarly, in *Collins v. George*, 102 Va. 506, 46 S. E. 684, the outbreak of the fire was found to have been attributable to the defendant.

"*Stephens v. Mutual Lumber Co.*, 103 Wash. 1, 173 Pac. 1031, upon which petitioner places considerable reliance (Pet. Br., p. 77), in no way conflicts with the *Atlas* decision. In *Stephens*, a fire, started by sparks from a donkey engine engaged in logging operations, destroyed certain personal property of the plaintiff employees of the lumber company. The evidence revealed that there was an interval of several hours between the outbreak of the fire and the damage complained of, during which the plaintiffs made no effort at all to remove their property from the area. In holding that recovery was barred by the plaintiffs' contributory negligence, the court did no more than to apply the familiar principle that an individual, once he has become aware of the occurrence of an act of negligence on the part of another, must exercise reasonable care to mitigate loss to himself stemming from that negligence. See *Prosser on Torts* (1941), p. 400. There was, of course, no suggestion by the court that the plaintiffs were under a duty to anticipate the commencement of the fire and to remove their property in advance; or that, had the fire spread through

2. Perhaps because of a recognition of these considerations, petitioner again seeks to rely—in connection with the material on the Government land near the right-of-way—upon Section 5807 of the Washington Revised Statutes (as it did with respect to the right-of-way itself, see *supra*, pp. 25–30). In this connection, it makes the broad assumption—necessary to cover this case—that the effect of this Section is to render a landowner liable to third parties for the presence of combustible material on his property even if (1) the fire which caused the damage originated on adjoining land and through the negligence of the adjoining landowner, and (2) the purported fire hazard on the owner's land was not the result of his own acts or those of his employees. The statute, however, does not say so¹⁵ and it has never been judicially construed as repealing the common law rule with respect to third party non-liability in such circumstances. If, however, petitioner were right in its view as to the scope of Section 5807, the statute (as we have pointed out) would impose liability of the absolute—rather than *respondeat superior*—

their property to that of other employees, the failure to take such advance precautions would have rendered plaintiffs liable to the others.

¹⁵ It is interesting to note that, where the Washington legislature has desired a violation of a particular forest statute to give rise to civil liability to third persons, it has felt constrained to include an express provision to that effect in the statute itself. For example, Section 5647 of the Washington Revised Statutes, R. C. W. § 4.24.040, which requires a person lawfully setting a fire on his own land to exercise care to prevent its spreading and causing damage to adjoining property, stipulates additionally that "if he fails so to do he shall be liable * * * to any person suffering damage thereby to the full amount of such damage."

type and could not be invoked here consistently with the terms of 28 U. S. C. 1346 (b). See pp. 29-30, *supra*.

C. ANY COMBUSTIBLE MATTER WAS NOT THE PROXIMATE CAUSE OF THE DAMAGE COMPLAINED OF

The court below did not restrict itself to determining that the purported presence of combustibles on and about the right-of-way did not constitute a breach of any duty imposed by state law upon the United States and actionable under the Tort Claims Act. As an independent ground, the court held that, reading the complaint in its entirety, the alleged negligence in this respect was not the proximate cause of the damage to petitioner's property. While, in light of the correctness of the court's reading of the Washington law on the responsibility of a landowner, there may be no necessity for this Court to consider the proximate causation holding, we submit that it too represents a proper application of generally accepted principles, fully accepted by the Washington courts.¹⁸

1. It is basic to the law of torts that an act of abstract negligence cannot support the imposition of liability; facts must further be alleged and proved which demonstrate that damage was proximately caused by the negligence. *Prosser on Torts* (1941), pp. 311, *et seq.*; Green, *Rationale of Proximate Cause*, 1927

¹⁸ It might be observed in passing that petitioner's assertion that the question of proximate causation was neither briefed nor argued below is incorrect. The Government raised this issue in its brief (pp. 21-22); petitioner responded in its reply brief (pp. 12-13); and the Court of Appeals brought up the subject during the course of the oral argument.

(pp. 3, 4). "Legal" or "proximate" cause is therefore an essential element in any cause of action sounding in negligence whether it be based on the asserted violation of a common law duty or a statute. Nor does it matter that the statute imposes absolute liability or even characterizes violations as "negligence per se." In either case, liability in tort is still dependent upon a showing that the harm proximately resulted from the violation. See, *e. g.*, *Schatter v. Bergen*, 185 Wash. 375, 55 P. 2d 344.

In Washington, as elsewhere, the proximate cause of a particular loss or injury is that "cause which, in a natural and continuous sequence, unbroken by any new, independent cause, produces [the damage], and without which that [damage] would not have occurred." *Burr v. Clark*, 30 Wash. 2d 149, 157, 190 P. 2d 769, 773. See also *Scobba v. City of Seattle*, 31 Wash. 2d 685, 198 P. 2d 805; *Viking Automatic Sprinkler Co. v. Pacific Indemnity Co.*, 19 Wash. 2d 294, 142 P. 2d 394; *Pierce v. Pacific Mutual Life Ins. Co.*, 7 Wash. 2d 151, 109 P. 2d 322; *Eckerson v. Ford's Prairie School District No. 11*, 3 Wash. 2d 475, 101 P. 2d 345. Cf. *Prosser on Torts* (1941), pp. 311, *et seq.* And this formula has been applied by the Washington courts with specific reference to fire damage. In holding in *Stephens v. Mutual Lumber Co.*, 103 Wash. 1, 173 Pac. 1031, that subsequent events, rather than the negligence which occasioned the outbreak of the fire, was the proximate cause of the loss, the court said (103 Wash. at 6):

One who loses property by fire is governed by the established rules of law, and recurring

to first principles, if subsequent to the act of the party charged, whether it be rightful in its inception, or wrongful in the sense that it is negligent, a new cause intervenes which itself is sufficient to stand as the cause of the misfortune, the first act is considered as too remote to sustain a recovery.

2. Assuming the truth of all of the factual allegations of petitioner's complaint, and measuring them against the foregoing test, it cannot be said that the damage to petitioner's property was proximately caused by the assertedly improper manner in which the Railroad maintained its right-of-way and operated its locomotives. According to the complaint, the fire spread, between noon on August 6, 1951 (when it was started by sparks from the locomotive) and August 11, 1951, to the 1,600 acre area in which petitioner had no interest (R. 15). For over a month thereafter (*i. e.*, until September 20 when a wind caused it to spread further on to petitioner's land), the fire allegedly was contained within that area and would have been completely extinguished had the forest ranger properly utilized the men, equipment, and water at his disposal for the purpose (R. 15, 25). Thus, the gravamen of petitioner's action is not the failure of the Forest Service to police the railroad's operations (which, as we have seen and as the court below held, it was under no obligation to do). Rather, it is the supposed failure of the Service to take the appropriate measures to suppress the fire after it had started on the right-of-way and proceeded to the 1600 acre area, but before it went beyond to petitioner's property.

With respect to the purported combustible material on the forest land adjoining the right-of-way—as distinct from the conditions on the right-of-way itself—the lack of requisite causal relationship to the damage complained of is even more apparent. Apart from the considerations referred to in the preceding paragraph, petitioner makes no assertion in its pleadings that this material increased to any degree the rapidity of the spread of the fire, or that the fire would not have spread but for their presence. As a matter of fact, there is not even a clear allegation that the flames ever reached this material. In these circumstances, even if the Government had been under a duty to petitioner to guard against the possibility that acts of negligence by the Railroad on the right-of-way might give rise to a fire and spread to nearby Government lands, petitioner's allegations as to the condition of the forest would still be wholly immaterial.

For these reasons (*supra*, pp. 17-39), liability may not be imposed upon the United States for the consequences of the forest fire because of the alleged presence of combustible matter upon or near the railroad right-of-way, or because of any other misconduct attributable to the Port Angeles Western Railroad.

II

LIABILITY MAY NOT BE IMPOSED UPON THE UNITED STATES UNDER THE TORT CLAIMS ACT FOR THE ASSERTED NEGLIGENCE OF THE FOREST SERVICE IN FIGHTING THE FIRE

The remaining question in the case is whether petitioner may recover damages for the asserted failure

of Forest Service personnel to fight the fire properly, once it had started. We now show that under this Court's decision in *Dalehite v. United States*, 346 U. S. 15, the answer to this question is in the negative and that the *Dalehite* holding on this point should not be disturbed because it is in accord with traditional tort law and the purpose of the Tort Claims Act.

A. THE ACTS OF THE FOREST SERVICE PERSONNEL IN FIGHTING THE FOREST FIRE ON PUBLIC AND PRIVATE LAND WERE THOSE OF PUBLIC FIREMEN

The court below determined that in fighting the fire—which, we emphasize again, had been negligently started by the Railroad on its own right-of-way and which then spread to private and public lands alike—the Forest Service personnel were acting in the capacity of public firemen. This ruling has ample support in the historical background of the Service, in the Congressional enactments pertaining specifically to its fire prevention and suppression activities, and in the allegations of petitioner's complaint. As an examination of these sources discloses, in the Service's efforts to prevent and suppress fires on forest land, it performs the same function, and renders the same services to the public at large, as do local fire departments maintained by cities and towns to protect the property of their residents.

1. *The Forest Service*.—Following the recommendations over a period of years of leading conservationists, who believed that such a step was essential to the preservation of the nation's timber supply, Congress in 1891 authorized the President to set apart

and reserve forest lands of the public domain, whether bearing commercial timber or not, in any state or territory where such land is located. Act of March 3, 1891, c. 561, § 24, 26 Stat. 1103, as amended, 16 U. S. C. 471. Almost immediately thereafter, on March 30, 1891, President Harrison exercised this authority by proclaiming the Yellowstone Park Timberland Reserve. During the balance of the Harrison administration, and the subsequent Cleveland administration, several additional reservations were made.¹⁷

In spite of its clear conservation purpose, the 1891 Act made no provision for the protection and administration of the forest reserves; nor did it provide any regular method whereby the developing principles of forest management could be applied. This deficiency was remedied in the Sundry Civil Appropriations Act of June 4, 1897, 30 Stat. 11, 35, which stipulated that the Secretary of the Interior shall "make provisions for the protection against destruction by fire and depredations upon the public forests and forest reservations" and "may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction." The Secretary of the Interior immediately undertook the administration and protection of the reservations, assigning the task to the then General Land Office which appointed a field force of

¹⁷ See Sparhawk, *The History of Forestry in America*, The Yearbook of Agriculture (U. S. Department of Agriculture, 1949) 702, 706.

supervisors and rangers.¹⁸ The managerial responsibility remained in the Department of the Interior until 1905 when Congress transferred it to the Department of Agriculture, where it was placed in the hands of the Bureau of Forestry.¹⁹ This Bureau, which was headed by Gifford Pinchot (the leading conservationist), became the Forest Service later in the same year and, in 1907, the Forest Reserves were renamed National Forests.²⁰

When the administration of the national forests was given to the Forest Service, the then Secretary of Agriculture advised the Service in a formal communication to Chief Forester Pinchot that "it must be clearly borne in mind that [these forests] are to be devoted to [their] most productive use for the permanent good of the whole people."²¹ For the past fifty years, this principle has been the Service's watchword in carrying out its duties in respect to the forests, which now are more than 150 in number and cover a total area in excess of 180 million acres.²² We cite here but a few examples. Timber management plans have been placed into effect to guide the growing and harvesting of timber crops in such a manner as will furnish "continuous supplies of timber for the

¹⁸ *Id.* at p. 709. See also, *Our National Forests* (U. S. Department of Agriculture Information Bulletin No. 49 (1951)), p. 2.

¹⁹ Act of February 1, 1905, ch. 288, 33 Stat. 628. See also *Our National Forests*, *supra*, n. 18, at p. 2.

²⁰ *Our National Forests*, *supra*, n. 18, at p. 2. See also Act of March 3, 1905, 33 Stat. 861, 872.

²¹ *Id.* at p. 4.

²² *Id.* at p. 3. See also Annual Report of the Secretary of Agriculture (1952), p. 18.

people of the United States." Range resources have been controlled to assure the best possible supply of forage year after year. Forestry and farming practices designed to protect watersheds and help prevent disastrous flood conditions have been adopted. Recreational areas have been established for the use and enjoyment of outdoor enthusiasts. And the search is continuous for methods and means of increasing further the productivity of all national forest land.²³

2. *Cooperation with State governments.*—At the same time that the interests of conservation were being furthered through the development and expansion of the national forest system, there was an increasing awareness of the great necessity of cooperation between federal and state governments in providing for protection against forest fires, *irrespective of their place of occurrence*. Cooperation came in 1908, with a federal statute directing the Forest Service to aid in the enforcement of the laws of the states and territories with regard to the prevention and extinguishment of forest fires. Act of May 23, 1908, ch. 192, 35 Stat. 259, 16 U. S. C. 553.

Following a series of unprecedented forest fires in 1910, which burned millions of acres in Minnesota, Idaho, Washington, and Oregon,²⁴ Congress decided to broaden the participation of the Forest Service in fire fighting activities. By Section 2 of the Act of March

²³ These and other functions of the Forest Service are described in some detail in *The Work of the U. S. Forest Service* (U. S. Department of Agriculture Information Bulletin No. 91 (1952)), pp. 5-20.

²⁴ See Guthrie, *Great Forest Fires of America* (U. S. Department of Agriculture (1936)), p. 6; *Highlights in Forest*

1, 1911, ch. 186, 36 Stat. 961, 16 U. S. C. 563, the Secretary of Agriculture was authorized to enter into cooperative agreements with states for the organization and maintenance of a system of fire protection on any private or state forest lands situated upon the watershed of a navigable river. And, in 1924, the Secretary's authority was further extended to include cooperative fire protection activities in all "the timbered and forest-producing lands" in "each forest region of the United States." Act of June 7, 1924, ch. 348, 43 Stat. 653, 16 U. S. C. 564, 565.

As a result of these statutory provisions, the Forest Service now cooperates with 43 states in providing fire protection on state and private forest lands.²² This cooperation takes several forms.²³ The Service has underwritten a substantial portion of the cost of needed equipment and training activities. It helps state foresters in the latter's direction of organized fire prevention and control. It conducts nation-wide fire prevention campaigns. It does extensive research into techniques and devices that will assist states and private landowners in fire prevention and suppression.

Further, the Service has entered into several agreements whereby it has assumed the function of under-

Conservation (U. S. Department of Agriculture Information Bulletin No. 83 (1952)), p. 9.

²² Annual Report of the Secretary of Agriculture (1951), p. 18.

²³ See *The Work of the U. S. Forest Service*, n. 23, *supra*, at pp. 12, 18; *The Budget of the United States for the fiscal year ending June 30, 1955*, p. 343.

taking the suppression of fires on *all* lands within a particular area, whether federally-owned or not. As stated in petitioner's complaint (R. 6-7, 9-10), such an agreement was outstanding in the area here involved and by its terms the personnel of the Forest Service were clothed with the duties and privileges of state forest wardens, including the right to conscript and impress men and equipment for fire suppression. And it should be noted that in Washington, as in some other jurisdictions, these wardens have among their duties the control and suppression of forest fires throughout the forest area of the state. See Rev. Code Wash. §§ 76.04.060, 76.04.070. In this capacity, the wardens clearly perform the same functions in relation to the forest area as a municipal fire department performs in relation to the community it serves.²⁷

While a summary of Forest Service fire prevention and suppression activities cannot tell the whole story, it does reflect the present magnitude of those activities.

²⁷ It may well be, as petitioner suggests (Pet. Br. 65), that a private person could, under a similar agreement with the State of Washington, assume the functions of state forest wardens. If so, that consideration hardly detracts from the force of the conclusion that action taken pursuant to such an agreement is in the capacity of a public fireman. As this Court noted in *Labor Board v. Jones & Laughlin Co.*, 331 U. S. 416, 429, when a private individual is performing a public function under authority from the state he acts as a public officer and assumes all of the powers and liabilities attaching thereto. See also *Thornton v. Missouri Pacific R. Co.*, 42 Mo. App. 58; *Dempsey v. New York Central & Hudson River R. Co.*, 146 N. Y. 290, 40 N. E. 867; *New York C. & St. N. R. Co. v. Fieback*, 87 Ohio St. 254, 100 N. E. 889; *Neallus v. Hutchinson Amusement Co.*, 126 Me. 469, 139 Atl. 671. And compare the discussion pp. 57-61, *infra*.

During the fiscal year 1953, for example, the Service controlled 11,063 forest fires at a cost of more than 5 million dollars and spent approximately 9.5 million dollars in the execution of its cooperative fire protection agreements with state governments.²⁸ The figures for the preceding year are no less impressive.²⁹

3. *Fire-fighting by the Forest Service.*—Nor is there merit in petitioner's contention that Forest Service employees are not public firemen because they are primarily caretakers of timberlands owned by the Government in a proprietary capacity, and fire fighting is only one of their duties and that service is for the special benefit of the Government (Pet. Br. 16, 17). Although the Government does have a direct concern in the preservation and protection of its vast tracts of national forest in order to preserve this invaluable national resource for the benefit of the people of the United States, petitioner's notion

²⁸ The 1955 Budget, n. 26, *supra*, pp. 338, 339, 343.

²⁹ Budget for the fiscal year ending June 30, 1954, pp. 402, 403, 406.

Despite these considerations, petitioner suggests (Pet. Br. pp. 38-39) that the relevant statutes confer authority upon the Forest Service to engage in fire prevention and suppression activities only in circumstances where the necessities of protecting Government-owned land require to do so. Leaving aside the fact that they are not interpreted in that fashion by the Service, if petitioner is right we fail to see the occasion for the enactment of the 1908, 1911 and 1924 Acts. For, as petitioner itself points out (Br. p. 38), Section 1 of the Act of June 4, 1897, 30 Stat. 35, as amended, 16 U. S. C. 551, gives broad authority to the Secretary of Agriculture to provide for protection against the destruction by fire of public and national forests.

that the Government's real interest is in the commercial exploitation of this timber is without validity. As we have shown, the Forest Service is concerned with the preservation of the forests from fire, whether publicly or privately owned. Pursuant to Congressional authorization, it aids almost every state in providing fire protection to all forest lands within the state. It underwrites a substantial portion of the cost of equipment and training, assists in the direction of organized fire prevention and control, does extensive research into fire prevention and suppression techniques and assumes, through the vehicle of cooperative agreements, the function of fire suppression on all lands within particular areas. It is difficult to conceive of any firefighters more peculiarly in the position of public firemen than the employees of the Forest Service. As in the case of a municipal fire department, the Forest Service makes no real distinction between fires on publicly or privately owned property.

In *Dalehite v. United States*, 346 U. S. 15, this Court held that the Coast Guard was acting as a public fireman in fighting the Texas City Disaster fires, even though firefighting is, of course, not the principal function of the Coast Guard, its primary concern being with numerous other types of activities. See *infra*, pp. 50-53. So, petitioner's attempt to define public firemen in terms of the comparative *quantum* of effort directed to this purpose is too artificial to be adaptable to the conditions involved.

4. It seems clear that the fire-fighting endeavors of the Forest Service in this case were undertaken pursuant

to this public policy of assisting in the prevention and suppression of forest fires—and not, as petitioner suggests, by reason of a special duty imposed upon landowners by Washington law. Apart from all other considerations, the Supreme Court of that state, in delineating the landowner's statutory and common law duty respecting the fighting of fires *not set by him*, has emphasized continually that it arises *only* in situations where the fire *originates or starts on* his own property. See the quotations at Pet. Br. pp. 59-61; *e. g.*, *Sandburg v. Cavanaugh Timber Co.*, 95 Wash. 556, 164 Pac. 200; *Jordan v. Spokane P. & S. Ry. Co.*, 109 Wash. 476, 186 Pac. 875; *Walters v. Mason County Logging Co.*, 139 Wash. 265, 246 Pac. 749. And other jurisdictions in which a landowner has any duty at all where the fire was not started *by* him impose the same limitation. See, *e. g.*, cases cited 42 A. L. R. 783, 821 *et seq.*; 18 A. L. R. 2d 1081, 1097.³⁰

As we have shown above, there is no basis for petitioner's apparent belief that a right-of-way granted to a railroad is, for the purposes of the statutory and common law obligations resting upon the owner of land, the property of the holder of the servient estate. See pp. 17-30, *supra*. While we do not discuss anew at this point the reasons why the right-of-way is (for

³⁰ To the extent, if any, that petitioner asserts that Section 5806 of the Washington Revised Statutes (R. C. W. § 76.04.380) changes the normal rule (see Pet. Br. p. 78), one complete answer is that the Section imposes no special duty upon the landowner to whose property a fire has spread prior to his receipt of a written notice from a state official.

such purposes) the property of the railroad alone, it is important to note that the freedom from responsibility of the owner of land upon which a railroad right-of-way is maintained is not restricted to instances where the claim is rooted in the alleged presence of inflammable materials on the right-of-way. Cf. p. 23, *supra*. To the contrary, that freedom extends to claims grounded upon the failure to prevent the spread of a fire. While there are many cases holding a railroad accountable for its failure to prevent the spread of a fire *developing on its right-of-way*—following the principle that petitioner seeks to apply against the United States³¹—there has not been, to our knowledge, a single occasion upon which the possessor of a reversionary interest in the surface of the land (*e. g.*, the holder of the servient estate in a railroad easement) has been held similarly accountable.

R. THE UNITED STATES IS NOT LIABLE FOR CLAIMS BASED UPON THE ALLEGED FAILURE OF ITS PUBLIC FIREMEN TO SUPPRESS A FIRE

Thus, the ultimate question is whether recovery may be had under the Tort Claims Act for the assertedly negligent failure of the Forest Service to conduct properly its public function of extinguishing forest fires. This is, of course, the precise question

³¹ See *e. g.*, *Jordan v. Spokane P. & S. Ry. Co.*, 109 Wash. 476, 186 Pac. 875, and cases cited 42 A. L. R. 783, 795, 812, *et seq.*, 18 A. L. R. 2d 1081, 1089, 1091. These cases show that, if the fire did not originate through the negligence of the railroad, it is liable only for the failure to exercise due care to prevent its spread. Absolute liability is generally imposed where the fire was due to improper operation of the locomotive.

that was before this Court in *Dalehite v. United States*, 346 U. S. 15, on which both courts below relied in ruling that petitioner's claim does not come within the ambit of the Act. We submit that, contrary to petitioner's assertions, the *Dalehite* holding conforms in full measure to the terms of the statute and to the traditional law of torts, and should be followed here.

1. 28 U. S. C. 1346 (b) (*infra*, p. 79) confers jurisdiction upon district courts over claims based on the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his employment, under circumstances where the United States, *if a private person*, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. 28 U. S. C. 2674 provides that the assumed liability is only "in the same manner *and to the same extent* as a private individual under like circumstances."

In *Feres v. United States*, 340 U. S. 135, the Court construed these provisions as meaning that the Tort Claims Act waives the prior immunity from suit only as to "recognized causes of action" and does "not visit the Government with novel and unprecedented liabilities" (340 U. S. 142) and, as a consequence, recovery will be denied in cases in which "plaintiffs can point to no liability of a 'private individual' even remotely analogous to that which they are asserting against the United States" (340 U. S. at 141). And, in *Dalehite v. United States*, *supra*, this construction was expressly reaffirmed with specific reference to

public firefighting activities on the part of the Coast Guard akin to those of the Forest Service in this case.

In *Dalehite*, the claim was made that the Coast Guard had negligently performed its general public function to fight the fire resulting from the explosion of fertilizer grade ammonium nitrate at Texas City and the District Court, rendering judgment against the United States, specifically found in this regard that the Coast Guard had been negligent "in failing * * * promptly and quickly" to "discover the fire on the *Grandcamp* * * * to use proper and efficient efforts to extinguish such fire on the *Grandcamp*," in "failing to remove the *Grandcamp* * * * [and the *Highflyer*] from the Texas City Harbor after fire was discovered thereon and before such explosion thereon," and in failing "to extinguish and prevent the spread of the fires in Texas City." The Court of Appeals reversed but, in doing so, did not discuss the merits of these findings. *In re Texas City Disaster Litigation*, 197 F. 2d 771 (C. A. 5). In its view, the requirement of analogous private liability had not been met.

This Court, affirming the determination that the circumstances of the Texas City explosion did not impose liability upon the United States, took a similar position in regard to the negligence charged to the Coast Guard (346 U. S. at 43-44):

As to the alleged failure in fighting the fire, we think this too without the Act. The Act did not create new causes of action where none existed before.

“* * * the liability assumed by the Government here is that created by ‘all the circumstances’, not that which a few of the circumstances might create. We find no parallel liability before, and we think no new one has been created by, this Act. Its effect is to waive immunity from recognized causes of action and was not to visit the Government with novel and unprecedented liabilities.” *Feres v. United States*, 340 U. S. 135, 142.

*It did not change the normal rule that an alleged failure or carelessness of public firemen does not create private actionable rights. Our analysis of the question is determined by what was said in the Feres case. See 28 U. S. C. §§ 1346 and 2674. The Act, as was there stated, limited United States liability to “the same manner and to the same extent as a private individual under like circumstances.” 28 U. S. C. § 2674. Here, as there, there is no analogous liability; in fact, if anything is doctrinally sanctified in the law of torts it is the immunity of communities and other public bodies for injuries due to fighting fire. This case, then, is much stronger than Feres. We pointed out only one state decision which denied government liability for injuries incident to service to one in the state militia. That cities, by maintaining fire-fighting organizations, assume no liability for personal injuries resulting from their lapses is much more securely entrenched. The Act, since it relates to claims to which there is no analogy in general tort law, did not adopt a different rule. See Steitz v. City of Beacon, 295 N. Y. 51 * * *. To impose liability for the alleged nonfeasance of*

the Coast Guard would be like holding the United States liable in tort for failure to impose a quarantine for, let us say, an outbreak of foot-and-mouth disease.³² [Emphasis added.]

2. It is difficult to see how petitioner can seriously challenge the correctness of this Court's observation in *Dalehite* that to hold actionable under the Tort Claims Act the alleged failure of federal public firemen to extinguish a fire which was not started by Government employees—and which did not originate on Government property—would be to visit the United States with a novel and unprecedented liability. To our knowledge, there has never been an instance in American jurisprudence in which liability has been imposed for such a failure—and petitioner has referred to none.³³ To the contrary, it has uni-

³² While the dissenting justices were of the view that plaintiffs were entitled to recovery, they did not take issue with the majority of the Court as to the fire-fighting immunity aspect of the case. Instead, the dissenting justices found the circumstances surrounding the manufacture and shipping of the FGAN to afford a basis for imposing liability.

As will be seen below (*infra*, pp. 62-73), the reference in the *Dalehite* opinion to *Steitz v. City of Beacon* is especially meaningful because that case arose under Section 8 of the New York Court of Claims Act which subjects the state and its subdivisions to the same liability as individuals or corporations for the same acts.

³³ *City of Denver v. Porter*, 126 Fed. 288 (C. A. 8), and the other cases cited by petitioner on pages 30-31 of its brief, all involved situations where—unlike this case—the fire originated on the defendant's property. Further, in all but *State v. City of Marshfield*, 122 Ore. 323, 259 Pac. 201, the fire was deliberately set by municipal employees, most frequently to consume garbage in a refuse dump. Thus, these cases stand simply for

formly been held that claims of that character are not cognizable in tort. See *e. g.*, *Edmondson v. Town of Morven*, 41 Ga. App. 209; *Wright v. City Council of Augusta*, 78 Ga. 241; *Brinkmeyer v. City of Evansville*, 29 Ind. 187; *Robinson v. The City of Evansville*, 87 Ind. 334; *Rhodes v. Kansas City*, 167 Kan. 719, 208 P. 2d 275; *Patch v. Covington*, 56 Ky 722; *Davis v. City of Lebanon*, 108 Ky. 688, 57 S. W. 471; *Small v. Board of Council of The City of Frankfort*, 203 Ky. 188, 261 S. W. 1111; *Yule v. City of New Orleans*, 25 La. Ann. 394; *Heller v. Mayor, Alderman, and Citizens of Sedalia*, 53 Mo. 159; *Wheeler v. City of Cincinnati*, 19 Ohio St. 19; *Irvine v. Chattanooga*, 101 Tenn. 291, 47 S. W. 419; *Tumlinson v. City of Brownsville*, 178 S. W. 2d 546 (Tex.); *Hughes v. State of New York*, 252 App. Div. 263, 299 N. Y. S. 387 (discussed pp. 66-68, *infra*).

Closely related to the cases in which the claim is founded upon the failure of a public fireman to extinguish a fire are those in which the claim results from the assertedly negligent failure of a city properly to perform its assumed duty of providing sufficient

the proposition that "one who negligently sets a fire on his land and keeps it negligently is liable to an action for any damage done by its spreading to the land of another." *Herrick v. City of Springfield*, 288 Mass. 212, 215, 192 N. E. 626. We do not take issue with this principle, which has been codified in Washington. Section 5647 of the Washington Revised Statutes, R. C. W. § 4.24.040. But it has no bearing whatsoever on this case since the fire was started by the Railroad on its own right-of-way.

water for fire protection. These cases also reject, without exception, the imposition of liability. See *e. g.*, *Miralago Corp. v. Village of Kenilworth*, 290 Ill. App. 230, 7 N. E. 2d 602; *Van Horn v. The City of Des Moines*, 63 Iowa 447, 19 N. W. 293; *Phillips v. City of Elizabethtown*, 218 Ky. 428, 291 S. W. 358; *Tainter v. City of Worcester*, 123 Mass. 311; *Howland v. The City of Asheville*, 174 N. C. 749, 94 S. E. 524; *Stevens v. Manchester*, 81 N. H. 369, 127 Atl. 873; *Gilbert v. New Mexico Construction Co.*, 39 N. M. 216, 44 P. 2d 489; *Grant v. City of Erie*, 69 Pa. 420; *Black v. The City of Columbia*, 19 S. C. 412; *Butterworth v. City of Henrietta*, 25 Tex. Civ. App. 467, 61 S. W. 975; *Foster v. Water Company*, 71 Tenn. 42; *Mendel v. City of Wheeling*, 28 W. Va. 233; *Steitz v. The City of Beacon*, 295 N. Y. 51, 64 N. E. 2d 704 (discussed pp. 68-72, *infra*.)

While it is true that this common result is not accomplished by a similar uniformity in rationale, the principal consideration underlying the vast majority of these decisions is the inability of the plaintiff to point to the breach of any duty which is owed by the municipality to him as an individual. It is generally recognized that fire protection, in common with police protection, is provided as an incident of government for the benefit of the public as a whole. As such, it is neither intended to, nor does, give rise to actionable rights in individual members of the public who may deem themselves to have been aggrieved by the failure of the undertaking to accomplish in full measure its

intended public objective.³⁴ Many of these holdings are also bottomed upon other considerations of public policy. The judicial fear has been expressed that a contrary result would eventuate in the bankruptcy of the municipality; that, as a practical matter, the municipality, by establishing a fire protection and suppression service, would become an insurer against fire loss; that it was most inadvisable to have courts and juries oversee, after the event, the work of firefighters. See *e. g.*, *Wilcox v. City of Chicago*, 107 Ill. 334; *Wright v. City Council of Augusta*, *supra*; *Brinkmeyer v. City of Evansville*, *supra*; *Van Horn v. City of Des Moines*, *supra*.³⁵ At least one court has suggested that

³⁴ In *Miralago Corp v. Village of Kenilworth*, *supra*, for example, the defendant village, after having first undertaken to supply water needed to extinguish a fire in an adjoining township, withdrew its assistance before this end was accomplished. The court found that the village, by voluntarily assuming the function of furnishing water, had obligated itself to continue to do so until the fire was extinguished. But, in the court's view, the obligation was one to the public generally and thus neglect in its performance was not actionable. Cf. *Vanhorn v. City of Des Moines*, *supra*; *Stevens v. Manchester*, *supra*.

³⁵ In the *Vanhorn* case, the court noted that, in the emergency situations which necessitate the intervention of fire fighting services, it is virtually impossible to ascertain what provisions and actions will prove sufficient for the occasion. Cf. *P. Dougherty Co. v. United States*, 207 F. 2d 626, 634 (C. A. 3), certiorari denied, 347 U. S. 912.

In the *Wilcox* case (107 Ill. at 339-340), the court stated the basic reason for the rule to be that otherwise it "would subject the city to the opinions of witnesses and jurors whether sufficient dispatch was used in reaching the fire after the alarm was given; whether the employees had used the requisite skill for its extinguishment; whether a sufficient force had been provided to secure safety; whether the city had provided

these potential consequences "might well frighten our municipal corporations from assuming the startling risk." *Foster v. Water Co.*, 71 Tenn. at 49.

3. Petitioner to the contrary notwithstanding, the firefighting holding in *Dalehite* did not incorporate into the Tort Claims Act the governmental-proprietary dichotomy of municipal corporation law—criticized in *Indian Towing Co. v. United States*, 350 U. S. 61, 65. This is shown by the cases dealing with the liability of private water companies for negligence leading to fire loss. These companies, of course, do not now and have never enjoyed sovereign immunity. Yet, in all but three jurisdictions, where liability is imposed on a contractual basis (see fn. 37, *infra*, p. 61), they are held not accountable for such loss. And, as is seen from *German Alliance Insurance Co. v. Home Water Supply Co.*, 226 U. S. 220, and *Moch v. Rensselaer Water Co.*, 247 N. Y. 160, 159 N. E. 896, the reason is little different from that at the foundation of the cases involving suits against municipalities. In addition, these cases provide the total answer to the argument made by petitioner (Br. pp. 64–67) that the contract between the Forest Service and the State of Washington affords a basis for imposing tort liability upon the United States.

In *German Alliance*, the water company had entered into a contract with the City of Spartanburg to sup-

proper engines and other appliances to answer the demand of the hazards of fire in the city * * *. To permit recoveries to be had for all such and other acts would virtually render the city an insurer of every person's property within the limits of its jurisdiction * * *. Sound public policy would forbid it, if it was not prohibited by authority."

ply water for, among other purposes, fire protection. Pursuant to the contract, the city directed the water company to install certain fire hydrants and connecting pipes in the neighborhood of a building which was insured by German Alliance. The company failed to do so. As a consequence, there was no water available to extinguish a fire which developed in the building. German Alliance, subrogated to the rights of the owner of the building, brought suit against the water company on the theory that the resulting loss was attributable to the latter's negligent violation of "its duty and obligations to adequately protect the property from fire."

Both of the lower courts held that the complaint failed to state a cause of action either in contract or tort, and this Court agreed. At the outset, it noted that the city was under no legal obligation to furnish water for fire protection and that, if it did so voluntarily, "it did not thereby subject itself to a new or greater liability." 226 U. S. at 227. Rather, "[i]t acted in a governmental capacity, and was no more responsible for failure in that respect than it would have been for failure to furnish adequate police protection." *Ibid.*

The Court then went on to hold that, since the common law did not impose a duty upon a public corporation to furnish fire protection, neither did it require private companies to do so. And, in response to the insurer's argument that such a duty was assumed by contract, the Court observed that, by its very nature, the contract was for the benefit of the

citizenry as a whole and that the "indirect" interest of individual citizens in its performance gave rise to no private right of action for an alleged breach. According to the Court, the private citizen (226 U. S. at 231):

* * * is interested in the faithful performance of contracts of service by policemen, firemen, and mail-contractors, as well as in holding to their warranties the vendors of fire engines. All of these employes, contractors, or vendors are paid out of taxes. But for the breaches of their contracts the citizen cannot sue—though he suffer loss because the carrier delayed in hauling the mail, or the policeman failed to walk his beat, *or the fireman delayed in responding to an alarm, or the engine proved defective, resulting in his building being destroyed by fire.*" [Emphasis added.]

The situation in *Moch v. Rensselaer Water Co.*, *supra*, was closely parallel to that in *German Alliance*. The defendant water company had entered into a contract with the city of Rensselaer to supply water to private homes and the city's fire hydrants. While the contract was in force, a warehouse close to Moch's

²² Cf. *Turner v. United States*, 248 U. S. 354. There, this Court, per Mr. Justice Brandeis, upheld the dismissal of a claim which had been grounded upon the failure of an Indian Nation to prevent certain mob violence which resulted in damage to plaintiff's property. Sovereign immunity had been waived by Congress. The Court observed that (248 U. S. at 358) "[t]he fundamental obstacle to recovery is not the immunity of a sovereign to suit, but the lack of a substantive right to recover the damages resulting from failure of a government or its officers to keep the peace."

property caught fire. The water company was notified of the fire but allegedly failed "to supply or furnish sufficient or adequate quantity of water, with adequate pressure to stay, suppress or extinguish the fire before it reached [Moch's warehouse]." Moch then brought suit against the water company both in contract and in tort, relying on the provisions of the contract between the water company and the city. Judge Cardozo, speaking for a unanimous court, observed that no actionable duty rests upon a city to supply its inhabitants with protection against fire. As a consequence, a member of the public could not maintain an action by reason of the water company's contract to supply water for fire hydrants, unless the contract showed that the water company had expressly agreed to be answerable to individual members of the public in spite of the fact the city itself would not have been so answerable (159 N. E. at 897). Judge Cardozo went on to point out, in respect to the action in tort, that the so-called "good Samaritan" rule, previously laid down in his opinion for the court in *Glanzer v. Shepard*, 233 N. Y. 236, 135 N. E. 275, 276, was not applicable, adding (159 N. E. at 898, 899):

The plaintiff would have us hold that the defendant, when once it entered upon the performance of its contract with the city, was brought into such a relation with every one who might potentially be benefited through the supply of water at the hydrants as to give to negligent performance, without reasonable notice of a refusal to continue, the quality of a tort.

There is a suggestion of this thought in *Guardian Trust & Deposit Co. v. Fisher*, 200 U. S. 57 * * * but the dictum was rejected in a later case decided by the same court *German Alliance Ins. Co. v. Homewater Supply Co.*, 226 U. S. 220 * * * when an opportunity was at hand to turn it into law. We are satisfied that liability would be unduly and indeed indefinitely extended by this enlargement of the zone of duty.³⁷

³⁷ See also, to the same effect, *Consolidated Biscuit Co. v. Illinois I. P. Co.*, 303 Ill. App. 80, 24 N. E. 2d 582; *Trustees v. New Albany Waterworks*, 193 Ind. 368, 140 N. E. 540; *Hone v. Presque Isle Water Co.*, 104 Me. 217, 71 Atl. 769; *House v. Houston Waterworks Co.*, 88 Tex. 233, 241, 31 S. W. 179; *Foster v. Water Co.*, 71 Tenn. 42; *Concordia Fire Ins. Co. v. Simmons Co.*, 167 Wis. 541, 168 N. W. 199; and cases cited 62 A. L. R. 1205. In the *House* case, the governing principle was put in these terms:

"It is not true, that for every failure to perform a public duty an action will lie in favor of any person who may suffer injury by reason of such failure. If the duty is purely a public duty, then the individual will have no right of action; but it must appear that the object and purpose of imposing the duty was to confer a benefit upon the individuals composing the public."

As this Court noted in the *German Alliance* case, *supra*, 226 U. S. at 229, and as is indicated in the exhaustive A. L. R. annotation just referred to, only three jurisdictions deviate from the majority rule. See *Mugge v. Tampa Water Works*, 52 Fla. 371, 42 So. 81; *Fisher v. Greensboro Water Supply Co.*, 128 N. C. 375, 38 S. E. 912; *Tobin v. Frankfort Water Co.*, 158 Ky. 348, 164 S. W. 956, holding that, by reason of its contract with the city and the franchise and other special privileges obtained thereby, a private water company assumes an actionable *contractual* obligation to individual members of the public to provide sufficient water for fire protection. It might be noted in this connection that the Supreme Court of Kentucky has expressly recognized that the maintenance of a fire department does not impose a correlative actionable duty on a municipality. See *Terrell v. Louisville Water Co.*, 127 Ky. 77, 105 S. W. 100.

4. Additional indication that the long-standing rule as to firefighting, invoked by this Court in *Dalehite* and illustrated by the above-discussed cases, is grounded upon considerations removed from sovereign immunity is to be found in the decisions of the New York courts in this area over the past quarter century. In 1929, New York waived its immunity from tort liability, as well as that of its political subdivisions, in the same fashion (though with broader scope) as did the Federal Government subsequently through the Tort Claims Act. It was this development which occasioned this Court's comment in *Indian Towing v. United States*, *supra*, 350 U. S. at 65, that "one State at least has sought to emerge" from the "'nongovernmental'—'governmental' quagmire that has long plagued the law of municipal corporations." But now, as before 1929, it is settled law in New York that the alleged failure of a public fireman to extinguish a fire, not originated by a public body, does not give rise to private actionable rights.

(a) Effective September 1, 1929, New York added to its Court of Claims Act, as Section 12a, the following:

The state hereby waives its immunity from liability for the torts of its officers and employees and consents to have its liability for such torts determined in accordance with the same rules of law as apply to an action in the supreme Court against an individual or a corporation, and the state hereby assumed liability for such acts, and jurisdiction is hereby conferred upon the court of claims to hear and determine all claims against the state to

recover damages for injuries to property or for personal injury caused by the misfeasance or negligence of the officers or employees of the state while acting as such officer or employee * * *.^{*} [Emphasis added.]

In 1939, Section 12-a was replaced by Section 8 (L. 1939, c. 860), which provides that:

The state hereby waives its immunity from liability and action and hereby assumes liability and *consents to have the same determined in accordance with the same rules of law as applied to actions in the supreme court against individuals or corporations*, provided the claimant complies with the limitations of this article. * * * [Emphasis added.]

In terms, therefore, these two Sections equate the liability of the state to that of a similarly-situated private individual or corporation, as does 28 U. S. C. 1346 (b) with respect to the tort liability of the Federal Government. And such has been its consistent construction by the New York Court of Appeals. As stated in *Jackson v. State of New York*, 261 N. Y. 134, 138, 184 N. E. 735, 736:

By section 12-a liability when proved by the rules of law applicable to individuals, has been affirmatively assumed * * * [the Section] declares that no longer will the State use the mantle of sovereignty to protect itself from such consequences as follow negligent acts of individuals * * * [i]t admits that in such negli-

^{*}L. 1929, chapter 467, quoted in *Jackson v. State of New York*, 261 N. Y. 134, 137, 184 N. E. 735, 736.

gence cases the sovereign ought to and promises that in future it will voluntarily discharge its moral obligations in the same manner as the citizen is forced to perform a duty which courts and legislatures have so long held, as to him, to be a legal liability. It transforms an unenforceable moral obligation into an actionable legal right and applies to the state the rule *respondeat superior*.³⁹

Moreover, while neither Section 12-a nor Section 8 makes specific reference to counties, municipalities, nor other political subdivisions, the Court of Appeals has held that their waiver of immunity is co-extensive with that of the state. See *e. g.*, *Bernardine v. City of New York*, 294 N. Y. 361, 365, 62 N. E. 2d 604; *McCrink v. City of New York*, 296 N. Y. 99, 106, 71 N. E. 419; *Holmes v. County of Erie*, 291 N. Y. 798, 53 N. E. 2d 369.

(b) By virtue of the broad and unlimited waiver of sovereign immunity in Section 8 of the New York Court of Claims Act, and its predecessor, the conventional governmental-proprietary dichotomy no longer is recognized in New York. As this Court itself pointed out in *Indian Towing v. United States*, 350

³⁹ Indeed, the waiver of immunity contained in the New York statute is broader than that reflected by the Federal Tort Claims Act. For example, the former encompasses claims grounded upon false arrest and imprisonment (*Dailey v. State of New York*, 75 N. Y. S. 2d 40) and assault (*Nephew v. State of New York*, 36 N. Y. S. 2d 541). The Tort Claims Act, however, expressly excepts from its coverage "[a]ny claim arising out of assault, battery, false imprisonment, false arrest * * *." 28 U. S. C. 2680 (h). Similarly, the New York statute does not have an equivalent to 28 U. S. C. 2680 (a), which bars claims based upon negligence in the performance of discretionary functions.

U. S. at 65, n. 1, liability in *Bernardine v. City of New York*, 294 N. Y. 361, 62 N. E. 2d 604, was imposed upon a municipality for injuries occasioned by a runaway police horse and in *Foley v. State of New York*, 294 N. Y. 275, 62 N. E. 2d 69, the same result was reached with respect to a claim grounded upon the negligent failure of a traffic light to function properly.

In both of these cases, the basis of the ruling was, as it had to be, that the conduct complained of violated either a common law or statutory duty, the nature of which duty was such as to confer actionable rights upon individual members of the public. In *Foley*, the court found that duty in the provisions of the New York Vehicle and Traffic Law relating to the maintenance of traffic signals. And *Bernardine* is merely an application of the principle that an equestrian's obligation to keep his mount under control is no different from the obligation of a motorist to operate his vehicle properly; a failure to meet the requisite standard of care gives rise to liability to persons injured thereby.⁴⁰

⁴⁰ For other instances of the imposition of liability on the state for negligence which can be said to be "in the conduct of governmental activities in circumstances like unto those in which a private person would be liable" (cf. *Indian Towing Co. v. United States*, 350 U. S. at 68), see *Brittan v. State of New York*, 103 N. Y. S. 2d 485 (improper supervision of physical fitness test required for admission to state education institution); *Williams v. City of New York*, 57 N. Y. S. 2d 39 (pedestrian injured by reason of negligent maintenance of firehouse); *Snyder v. Binghamton*, 245 N. Y. S. 497, affirmed, 233 App. Div. 782, 250 N. Y. S. 917 (negligent operation of fire truck).

(c) Since the enactment of Section 12-a, the New York courts on at least two occasions have been called upon to decide whether the elimination of sovereign immunity in tort, and the subjection of the governmental units of the state to the same liability that is imposed upon private individuals, rendered actionable the alleged negligent failure of a municipality to prevent loss of private property flowing from a fire which did not originate on public property, nor through the carelessness of public employees. The answer on both occasions was unequivocally in the negative.

In *Hughes v. State*, 252 App. Div. 263, 299 N. Y. S. 2d 387, a fire of unknown origin spread to a warehouse and destroyed certain property which had been stored therein by the plaintiff. Relying in part on Section 12-a, which he contended rendered the state answerable for the negligence of its officers in failing to provide fire protection to his property, plaintiff brought suit to recover the loss. In his complaint, he alleged that the state "through its authorized agent" the city of Schenectady "failed, omitted, and neglected to supply or furnish sufficient and adequate supply of water, hose, and pressure to transport the same and did not have sufficient men or apparatus to propel, control, or extinguish the fire in question," and that the damage to his property stemmed from these failures (252 App. Div. 264).

The New York Court of Claims, which had previously observed that the state "has rendered itself liable, where a private individual would be responsible" (*American Engineering Co. v. State of New York*), 273 N. Y. S. 843, 856), dismissed the complaint

for failure to state a cause of action. The Appellate Division affirmed. Addressing itself first to the liability of the City of Schenectady, the court observed (252 App. Div. at 265):

The protection of all buildings in a municipality from destruction or injury by fire is for the benefit of all the inhabitants and for their relief from a common danger. The Legislature has authorized the municipalities of the State to provide fire apparatus and to supply water for the extinguishment of fires. The grant of such a power must be regarded as exclusively for public purposes and as belonging to the municipal corporation, when assumed, in its public, political or legislative character. No duty is imposed upon the municipality; a mere discretionary authority is conferred upon it. A city does not, by acting under such a statute and providing itself with the necessary equipment enter into any contract or assume any implied liability to the owners of property to furnish ways and means for the extinguishment of fires upon which an action can be maintained. No legal duty rests upon a city to supply its inhabitants with protection against fire (*Springfield Fire Ins. Co. v. Village of Keeseville*, 148 N. Y. 46; *Moch Co. v. Rensselaer Water Co.*, 237 *id.* 160).

The extinguishment of fires is a function which a municipal corporation undertakes in its public, governmental capacity and in connection with which it incurs no civil liability, either for inadequacy in equipment or for the negligence of its employees. It is well settled that a municipal corporation is not responsible

for the destruction of property within its limits by fire which it did not set, merely because although it had established a fire department, through the negligence or other default of the corporation or its employees the members of the fire department failed to extinguish the fire, whether this failure is due to an insufficient supply of water, the neglect or incompetence of the firemen or the defective condition of the fire apparatus. * * *

Examining the contention that Section 12-a had the effect of rendering the state liable for the failure to furnish adequate fire protection, the court determined that (252 App. Div. at 266):

* * * there is no moral or legal obligation resting on the State to furnish such protection. In order to impose a liability on the State there must be an obligation on its part. The State may not assume liability where there is none. * * *

If the State is obligated to protect the inhabitants of its municipalities against loss by fire then by the same token it must give like protection to all its residents including those living in isolated sections within its boundaries. It is just as reasonable, just as logical, to argue that the State must guard its citizens against the ravages of disease or protect them against crime or other like calamity or respond in damages to those aggrieved for its failure to do so. We cannot sanction such a conclusion.

The *Hughes* case did not reach the New York Court of Appeals. Eight years later (in 1945), however,

that court rendered its decision in *Steitz v. City of Beacon*, 295 N. Y. 51, 64 N. E. 2d 704, which as heretofore noted, was cited by this Court in *Dalehite*. In the *Steitz* case, as in *Hughes*, the plaintiff sought to recover for a loss of property occasioned by fire. The charter of the defendant municipality provided that the municipality "may construct and operate a system of waterworks" and "shall maintain [a] fire * * * department." Pursuant to these provisions, the city established a waterworks system for, among other purposes, that of providing fire protection. According to the allegations of plaintiff's complaint, his premises were destroyed because the city negligently failed (1) to create and maintain a fire department, including fire equipment and protection for the benefit of his and neighboring properties; and (2) to keep in repair, and to operate properly, certain valves which were part of the waterworks system, with the consequence that an insufficient quantity of water was provided to combat the fire.

On the authority of the *Hughes* case, the trial court granted the defendant's motion to dismiss the action (52 N. Y. S. 2d 813):

[That case] would seem to state the controlling law on the present motion. Liability is sought to be predicated upon the failure of the municipality to furnish adequate and sufficient fire protection, not upon any affirmative act of the municipality through its agents or employees causing or contributing to the conflagration. No legal duty rests upon a municipality to supply its inhabitants with fire pro-

tection, and the exercise of this power by a municipality is a governmental function for which no civil liability may be imposed.

The Appellate Division affirmed. 268 App. Div. 1008, 52 N. Y. S. 2d 788.

The Court of Appeals, in turn affirming, posed the question before it in these terms (295 N. Y. at 54-55):

The waiver of sovereign immunity by section 8 (formerly § 12-a) of the Court of Claims Act has rendered the defendant municipality liable, equally with individuals and private corporations, for the wrongs of its officers and employees. In each case, however, liability must be "determined in accordance with the same rules of law as applied to actions in the supreme court against individuals or corporations." Accordingly the city is governed and controlled by the rules of legal liability applicable to an individual sued for fire damage under the circumstances alleged in the complaint. The question is *whether the facts alleged would be sufficient to constitute a cause of action against an individual under the same duties as those imposed upon the city solely because of failure to protect property from destruction by fire which was started by another.* [Emphasis added.]

The answer was this (295 N. Y. at 55-57):

There is no such liability known to the law unless a duty to the plaintiff to quench the fire or indemnify the loss has been assumed by agreement or imposed by statute. There was no agreement in this case to put out the fire or

make good the loss, and so liability is predicated solely upon the above-quoted provisions of the city's charter defining its powers of government. *Quite obviously these provisions were not in terms designed to protect the personal interest of any individual and clearly were designed to secure the benefits of well ordered municipal government enjoyed by all members of the community.* There was indeed a public duty to maintain a fire department, but that was all, and there was no suggestion that for any omission in keeping hydrants, valves or pipes in repair the people of the city could recover fire damages to their property.

Any intention to impose upon the city the crushing burden of such an obligation should not be imputed to the Legislature in the absence of language clearly designed to have that effect. * * * As was said in *Moch Co. v. Rensselaer Water Co.* (247 N. Y. 160, 166), "If the plaintiff is to prevail, one who negligently omits to supply sufficient pressure to extinguish a fire started by another, assumes an obligation to pay the ensuing damage, though the whole city is laid low. A promisor will not be deemed to have had in mind the assumption of a risk so overwhelming for any trivial reward." *A fortiori* the Legislature should not be deemed to have imposed such a risk when its language connotes nothing more than the creation of departments of municipal government, the grant of essential powers of government and directions as to their exercise.

Such enactments do not import intention to protect the interests of any individual except as they secure to all members of the community

the enjoyment of rights and privileges to which they are entitled only as members of the public. Neglect in the performance of such requirements creates no civil liability to individuals (Restatement of Torts, § 228; *Moch Co. v. Rensselaer Water Co.*, *supra*; * * * [Emphasis added.]

* * * *

The case at bar is governed by our decision in the *Moch* case (*supra*).

* * * *

It was [there] held that the action could not be maintained for a tort at common law or for a breach of statutory duty because the duty was owing to the city and not to its inhabitants and because the failure to furnish an adequate supply of water was at most the denial of a benefit and was not the commission of a wrong.

The *Moch* case is controlling here because it has judicially determined that a corporation under a positive statutory duty to furnish water for the extinguishment of fires is not rendered liable for damages caused by a fire started by another because of a breach of this statutory duty.⁴¹

⁴¹ The court's reference to Section 288 of the Restatement of the Law of Torts was especially apposite. That Section provides that the negligent failure to comply with a legislative enactment does not give rise to civil liability if the enactment was designed exclusively either "to secure to individuals the enjoyment of rights or privileges to which they are entitled only as members of the public"; or to require "the performance of a service which the state or municipality undertakes to give to the public" except where a contractual duty has been assumed "to perform a service which the state or municipality

In short, the New York courts hold that the claimant had no substantive right to recover prior to the sovereign's consent to suit, and there can therefore be no recovery after the waiver unless the sovereign clearly indicates—as the legislature did not in New York and Congress has not in the Tort Claims Act—a specific purpose to create a new substantive right against the Government. See also, *Turner v. United States*, 248 U. S. 354, 358, discussed in footnote 36, *supra*, p. 59.

5. In an endeavor to escape the effect of *Dalehite*, and the long line of decisions upon which its fire-fighting holding was based, petitioner points to the Court's decision in *Indian Towing Co. v. United States*, 350 U. S. 61. But that reliance is unwarranted. In *Indian Towing*, the Court held that a claim grounded upon alleged negligence on the part of the Coast Guard in the maintenance of a navigational aid was within the purview of the Tort Claims

is under a legal duty to give." Cf. *Hayes v. Michigan Central R. Co.*, 111 U. S. 228, 240.

It is further to be noted that the result reached in the fire-fighting cases has also been reached by the New York courts in post-1929 cases involving loss sustained as a consequence of the purported failure to provide adequate police protection. See, e. g., *MurRAIN v. Wilson Line, Inc.*, 270 App. Div. 372, 375, 59 N. Y. S. 2d 750, affirmed, 296 N. Y. 845, 72 N. E. 2d 29; *Schuster v. City of New York*, 121 N. Y. S. 2d 735, affirmed, 286 App. Div. 389, 143 N. Y. S. 2d 778. As in the fire protection cases, the rationale was not that the municipality enjoyed sovereign immunity but was, rather, that in providing fire and police services to the public at large, a municipality does not assume an actionable duty running to individual members thereof. Cf. Mr. Justice Brandeis in *Turner v. United States*, fn. 36, *supra*, p. 59.

'Act and could ground recovery. With respect to the provision of Section 2674 that the liability imposed by the Act is "in the same manner and to the same extent as a private individual under like circumstances," the court stated that (350 U. S. at 64-65) "it is hornbook tort law that one who undertakes to warn the public of danger and thereby induces reliance must perform his 'good Samaritan' task in a careful manner."

At the same time, the court did not disturb the *Dalehite* holding. On the contrary, the majority ruled *Dalehite* to be distinguishable (350 U. S. at 69):

The differences between this case and *Dalehite* need not be labored. The governing factors in *Dalehite* sufficiently emerge from the opinion in that case.

In an accompanying footnote, the Court observed that in *Dalehite* the Court had:

disposed of a claim of liability for negligence in connection with fire fighting by finding that "there is no analogous liability * * *" in the law of torts."² 346 U. S., at 44.

² In the same footnote, the court made passing reference to *Workman v. New York City*, 179 U. S. 552. It might be noted, however, that the complaint in *Workman* was not grounded upon the failure to fight a fire with due care or otherwise prevent fire loss. Rather, the claim there was based on the allegedly negligent navigation of a fire boat on its way to a fire.

We have never contended that, if a Forest Service vehicle were to collide with a privately owned vehicle, because of the negligence of the Government driver, liability could not be imposed upon the United States. The Forest Service (in common with other Governmental agencies) is under the same duty in its operation of its vehicles as is the private motorist, and is liable for the

The basis for this distinction needs little further elaboration. As has been seen, Judge Cardozo, a foremost exponent of the Good Samaritan principle (cf. *Glanzer v. Shepard*, 233 N. Y. 236), in terms rejected the application of that principle where a private person, like the Forest Service here, undertook by contract to perform the public function of affording fire protection. *Moch v. Rensselaer Water Co.*, *supra*, pp. 59-61. And, although sometimes not expressed, there was perforce the same recognition of the inapplicability of the Good Samaritan rule in the other cases which hold that states, cities, and private corporations do not—by reason of a contractual or statutory assumption of the task of providing the public with personnel, water or equipment for fire suppression—agree to assume tort liability to individuals for imperfect fulfillment of the functions of firefighting.⁴³

In the final analysis, petitioner asks this Court to hold that the Tort Claims Act does much more than waive the prior sovereign immunity in tort—that, additionally, the Act represents the assumption by the Federal Government of actionable duties, and thus liabilities, which are not imposed either upon other

negligence of its employees in this regard to the extent that a similarly situated private motorist would be held accountable. We stress again (see *supra*, pp. 53-73) that, as the New York courts have recognized in the application of the Court of Claims Act of that state, the public duty to suppress fires is of a different character.

⁴³ The distinction is equally applicable to the other cases upon which petitioner relies in arguing (Pet. Br. pp. 44, 62-63) that the United States may be held liable as a volunteer.

governmental units or upon private citizens. As we have pointed out, this Court, like the New York Court of Appeals with reference to that state's waiver of immunity, has refused to do so. Looking to the statutory terms, the court observed both in *Feres* and in *Dalehite* that the Tort Act has—and was intended to have—no such effect; that, instead, its effect “is to waive immunity from recognized causes of action and * * * not to visit the Government with novel and unprecedented liabilities.” See pp. 50-53, *supra*. We submit that there is plainly no occasion for reading the Act otherwise in this case, and that the *Dalehite* holding should be reaffirmed.

Indeed, immunity from tort liability in the case of the firefighting activities of the Forest Service would appear to be at least as, and perhaps far more, essential than in the case of the Coast Guard, of other Federal agencies or even local governmental units. The United States owns vast national forests for the benefit of the people of this country. As petitioner's brief (p. 39) correctly states, “The Federal government owns a substantial majority of the timber and timberlands in the Pacific Northwest and a large part of the remainder of the nation's timber.” We have already noted that the colossal task of the Forest Service is indicated by the fact that for the fiscal year 1953 alone, the Service controlled over 11,000 forest fires, at a cost of more than five million dollars, and spent approximately 9½ million dollars in the execution of its cooperative fire protection agreements with the state governments (*supra*, p. 46). Petitioner seeks a decision in effect extending an invitation to every commercial lumber corporation injured by fire originating on, crossing, or affecting the public domain to seek indemnity from the United States.

It may be, as petitioner argues, that the janitor or custodian of a public building who negligently attempts to put out a fire with a fire extinguisher is not a public fireman, but the analogy is entirely inapposite to the Forest Service, organized and maintained in large part for fire protection service.

The Government submits that for the efforts of the United States to preserve a great national resource for the benefit of the people of this country to be accompanied with the enormous potential liabilities which would result from acceptance of petitioner's contention would unduly amplify the existing rights of private property. Petitioner had the benefit of the firefighting services of the Forest Service which were almost, but not quite, successful in suppressing the forest fire and avoiding injury to petitioner's property. Petitioner is entitled to no more. "The law," says Dean Pound's "Introduction to the Philosophy of Law" (p. 189), "enforces the reasonable expectations arising out of conduct, relations and situations."⁴ Neither petitioner nor any other commercial lumber company has had a reasonable expectation of effecting, upon the theory of this case, a recovery from the United States by reason of a forest fire negligently set by a third party.

Not only would the petitioner receive what would be in substance a windfall if the decision below is reversed, but the United States would become subject, for the first time, to potential liability of the greatest magnitude. In large part, negligent or inefficient fire-fighting has been held not to be the basis

⁴ Cf. *Selected Writings of Benjamin Nathan Cardozo* (1947), p. 207.

of a private claim because the courts have recognized that to impose such liability on a municipality or other public body might well lead to the abandonment of public fire fighting activities; for instance, the potential cost for the burning of an entire town, or part of one, would be too great. In like fashion, if petitioner is sustained, the United States may be held liable for the destruction, through a forest fire, of large areas, perhaps even an entire town or city.⁴⁵ Congress might see fit to make contributions in such a case, but the law as it has been developed does not impose such liability on the United States as a matter of right.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below should be affirmed.

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OCTOBER 1956.

⁴⁵ For example, Santa Barbara, California (with a population in 1950 of 44,913), and the surrounding area (with a total estimated population, including Santa Barbara, of 100,000) borders on the Los Padres National Forest. During 1955, a catastrophic forest fire developed in the national forest which was suppressed, at a cost to federal and state authorities of approximately \$1,000,000. We are informed by the Forest Service that this fire definitely endangered the Santa Barbara area and neighboring communities, and might have spread to them if it had not been suppressed in time.

APPENDIX

1. The relevant provisions of the Federal Tort Claims Act are as follows:

28 U. S. C. 1346 (b).

Subject to the provisions of Chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

* * * * *

28 U. S. C. 2674.

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

2. The relevant provisions of the Revised Code of Washington are as follows:

Section 4.24.040 (Revised Statutes § 5647).

Action for negligently permitting fire to spread. If any person for any lawful purpose

kindles a fire upon his own land, he shall do it at such time and in such manner, and shall take such care of it to prevent it from spreading and doing damage to other persons' property as a prudent and careful man would do, and if he fails so to do he shall be liable in an action on the case to any person suffering damage thereby to the full amount of such damage.

Section 76.04.370 (Revised Statutes § 5807).

Abatement of fire hazards—Recovery of cost. Any land in the state covered wholly or in part by inflammable debris created by logging or other forest operations, land clearing, or right-of-way clearing and which by reason of such condition is likely to further the spread of fire and thereby endanger life or property, shall constitute a fire hazard, and the owner thereof and the person responsible for its existence shall abate such hazard. If the state shall incur any expense from fire fighting made necessary by reason of such hazard, it may recover the cost thereof from the person responsible for the existence of such hazard or the owner of the land upon which such hazard existed, and the state shall have a lien upon the land therefor enforceable in the same manner and with the same effect as a mechanic's lien. Nothing in this section shall apply to land for which a certificate of clearance has been issued.

If the owner or person responsible for such hazard refuses, neglects, or fails to abate the hazard, the supervisor may summarily cause it to be abated and the cost thereof may be recovered from the owner or person responsible therefor, and shall also be a lien upon the land enforceable in the same manner with the same effect as a mechanic's lien. The summary action may be taken only after twenty days' notice in writing has been given to the owner or reputed owner of the land on which the

hazard exists either by personal service or by registered letter addressed to him at his last-known place of residence.

Section 76.04.450 (Revised Statutes § 5818).

Olympic Peninsula area protection. All forests and timber upon all land in the state, lying west of a line one mile west of the eastern boundary of range ten west of the Willamette Meridian and north of the north boundary line of Grays Harbor county, shall be protected and preserved from the fire hazard caused by reason of the unusual quantity of fallen timber upon such land. It shall be unlawful for any person to do any act which shall expose any of the forests or timber upon such land to the hazard of fire.

**In the
Supreme Court of the United States**

OCTOBER TERM, 1956

**RAYONIER INCORPORATED, a corporation, *Petitioner,*
vs.
UNITED STATES OF AMERICA, *Respondent.***

**UPON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT**

REPLY BRIEF OF PETITIONER

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**In the
Supreme Court of the United States**

OCTOBER TERM, 1956

RAYONIER INCORPORATED, a corporation, *Petitioner*,

vs.

UNITED STATES OF AMERICA, *Respondent*.

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**In the
Supreme Court of the United States**

OCTOBER TERM, 1956

RAYONIER INCORPORATED, a corporation,
Petitioner,

vs.

UNITED STATES OF AMERICA, Respondent.

No. 45

UPON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF OF PETITIONER

Preliminary

Attention is called to Government counsel's failure to discuss Part 5 of Petitioner's opening brief relating to the construction of the amended complaint. Tacitly at least, they concede our points as well taken.

We do not accept Respondent's statement of "Questions Presented" as accurately or completely descriptive of the issues here to be reviewed. Neither do we accept its Statement of the case as adequate to fairly present the material facts.

Liability of United States as Volunteer

Respondent's brief is notably deficient in its failure to meet head on, the position of the Forest Service as a volunteer. Whatever the reason for its actions, the fact is that as soon as the fire broke out on August 6, the Forest Service assumed supervision and direction of the fire fighting at all stages. The facts are that the

Forest Service induced reliance by Petitioner upon the Forest Service, that the Forest Service was negligent, that by reason of such negligence the fire broke away and that Petitioner was damaged as a result.

The law, as made perfectly clear in *Indian Towing Company v. United States*, 350 U.S. 61, is that the Forest Service having undertaken to act and having induced reliance, had a duty to act without negligence. Under *Indian Towing* it does not matter whether the reason for the Government's assumption of this role is that it was acting as a public fire department or as conservator of Government-owned timber or under contract with the State of Washington, or as an owner of land on which the fire started or from which the fire spread.

The language of this Court in the *Indian Towing Company* decision, 350 U.S. at p., 100 L.ed. (Advance p. 89), can aptly be paraphrased as follows:

"The Forest Service need not have undertaken that responsibility but the fact remains that it did so and did so voluntarily. Petitioner and others in the area knew of this and relied upon the Forest Service to carry out its assumed responsibility. Once the Forest Service exercised its discretion to supervise and direct the fire fighting and engendered reliance thereon, it was obligated to use due care to make certain that the fire was controlled and extinguished and that if the fire did not become extinguished it was further obligated to use due care to discover that fact and to take all reasonable and prudent action and employ sufficient men and equipment, under the circumstances prevailing, to prevent its spread. If the Forest

Service failed in its duty and damage was thereby caused to Petitioner, the United States is liable under the Tort Claims Act."

It does not matter that the Forest Service participated in combating a great many fires throughout the United States and its Territories, nor that it spent a lot of money in doing so.¹ The Forest Service controls the great majority of the timbered areas. Its costs are minor compared to the value of the Government timber it is supposed to protect. Neither are its costs high in proportion, when compared to similar costs incurred by private industry.

The fact that the Forest Service does cooperate extensively, both with the states and with private industry, is no more significant than the fact that private industry in the aggregate cooperates extensively with the Forest Service.

Government counsel again have ignored and refuse to answer our question as to whether the Petitioner would be liable to the Government were the situations in this case reversed. Suppose it were the Rayonier logging superintendent who had assumed supervision and direction of the fire fighting and the Forest Service had relied upon him to do so. Suppose it were Rayonier's logging superintendent who said in effect:

"In spite of the long dry spell, the low humidity, the dry Northeasterly winds, the smoldering fires

¹The statistics quoted by Government counsel on p. 46 of their brief that in fiscal year 1953 the Service controlled 11,063 forest fires at a cost of more than \$5,000,000 can be misleading unless it is borne in mind that within the category of forest fires are included numerous minor spot fires at camping grounds and elsewhere in forest areas and that the bulk of the expense is incurred in connection with comparatively few major conflagrations.

and the tremendous stands of timber to the leeward, we will do nothing to try to extinguish this smoldering fire; we will only put 8 or 10 men to stand watch during the daytime over the 1600 acre burning area and we will leave the fire completely unattended after the normal daytime working hours."

Would Rayonier be liable for such grossly negligent indifference? Would it be immune from liability because it lends men and equipment to assist in any and all fire fighting in the area, both on public and private lands, whenever it is called upon to do so?

If Petitioner, a private person, would be liable under these circumstances, it necessarily follows that the United States is liable, for that is the test imposed by the Tort Claims Act.

Under the Tort Claims Act justice is supposed to be applied equally in all directions. But Government counsel would not have it so.

Counsel argue that if the Government is liable in this case it would become an insurer. They point out that whole communities might be destroyed by fire and redress would be sought from the Government. The simple answer is that the Government would not be an insurer, but if its employees are negligent and their negligence is the cause of the damage, the Government should pay. Why not? Certainly, Congress intended that it should when it enacted the Tort Claims Act. Bigness of property holdings, of number of employees, of aggregate spending, or of number of transactions is no proper basis of immunity. The amount of damage caused by negligence is no ground for immunity. If the philoso-

phy of counsel's argument were sound, then General Motors Corporation should be immune from liability because it is big; doubly immune if the injured party is badly hurt. Though the analogies sound preposterous and ridiculous, we see no difference in fundamental principle.

Forest Service Employees Were Not Public Firemen

In their brief, Government counsel would lead this Court backward to the abandoned shelter of the "general welfare" and "public function" theories which are found in the definitions of "governmental function" to justify immunity of municipal corporations. Counsel's speculations are unrealistic, contrary to the allegations of the amended complaint, contrary to fact, and immaterial under the Federal Tort Claims Act.

They would have this Court believe that the Forest Service and the Forest Service alone, is equipped to fight any and all fires in its various districts; that it alone acts in case of fire; that its principal occupation is fire fighting; that without the Forest Service no organized fire fighting could take place and that only Federal money is spent for fire protection and suppression.

The facts are, as the amended complaint alleges (R. 16-18), that the Forest Service has relatively little fire fighting equipment, and devotes a relatively small amount of its time, efforts and money on fire prevention and suppression activities. Petitioner herein, Rayonier Incorporated, and other timber operators also maintain fire fighting equipment and have men available to fight fires in this area, and it is the expected

practice that the one in charge, namely, the District Ranger of the Forest Service, will draw on this reservoir according to the needs of the particular situation.

The fact is, as alleged in the complaint (R. 16-18) that neither the Forest Service nor the Petitioner nor any other timber operator alone has sufficient men and equipment to cope with a major fire; that each has a fire suppression plan to be put into operation in case of need whereby the men and equipment in the area can be called upon to aid in the fire fighting. It is natural and logical that some one of the timber operators in a given area, that is, the Forest Service, the State of Washington, or Rayonier Incorporated and other private timber industries, assume leadership and command upon the outbreak of major fire. There are a number of areas in the Pacific Northwest where private industries or private associations undertake that leadership.

The Petitioner herein would not maintain fire equipment nor train its men in fire fighting duties were it not for the protection of Petitioner's timber. For exactly the same reasons the Forest Service maintains some fire equipment and some men, and were it not for the fact that the Forest Service has extensive holdings in this area, it would have none. The Forest Service does not have authority to engage in fire fighting activities except under circumstances where Federally-owned timber is involved (see Petitioner's Opening Brief, pp. 38-41). It is because of the intermingling of public and private timber holdings and the fact that fire is not an observer of titles or boundary lines that cooperation is necessary.

Liability of United States for Conditions and Practices on Right of Way

On pp. 18-20 of the answering brief, Government counsel, without warrant, go outside the record before this Court. The amended complaint alleges that the United States "owned, had control of and free and unrestricted access to" the right of way and adjoining lands upon which the fire started (R. 11). That allegation must be accepted as fact for all purposes of this hearing. It was not frivolously or carelessly made. We do not, and this Court cannot, accept the statements of Respondent's counsel as complete, correct or presented in such manner as to enable this Court to appraise and determine fairly the rights, duties and obligations of the several parties involved. We cannot properly, and do not intend to here present our evidence supporting that allegation of the complaint. But under the allegation we are entitled and prepared to prove that the United States was the legal and equitable owner of the right of way,² had contractual and property rights giving it effective and practical right of access to and control of the right of way, and that the relationships and dealings between the Government and the Port Angeles Western Railroad were such as to justify the Court in finding that the Government is fairly chargeable with responsibility for the conditions and practices on the lands in question.

Respondent's brief is misdirected in its discussion of the Government's duties as owner of the land across

²Under Washington law the vendee under a forfeitable executory contract of sale has neither legal nor equitable title or interest in the property. *Ashford v. Reese*, 132 Wash. 649, 233 Pac. 29 (1925), *Turpen v. Johnson*, 26 Wn.2d 716, 175 P.2d 495 (1946).

which was operated the Port Angeles Western Railroad.

It is misdirected because it cites cases dealing solely with the rights and obligations of the dominant estate owner and the servient estate owner as between themselves, but which do not involve their respective obligations to third parties.

It is misdirected because it cites many cases dealing with the liability of railroad companies for fire originating on and spreading from the railroad right of way. In the case at bar Petitioner could sue either the railroad company (the dominant owner) or the United States (the servient owner) or both of them, as Petitioner elects. Here we have chosen to sue only the United States. The fact that we might also sue the railroad is immaterial.

It is misdirected in not distinguishing between an easement, which is a right to use property, and the property itself. For example, on page 27 Respondent's brief says that the owner of the servient estate "has no duties with respect to the easement except the negative one of not interfering with the latter's use." It is correct that the *right or permission to use* must not be unreasonably interfered with. But the owner of the servient estate is neither precluded nor excused from his rights and duties with respect to the land to the extent that his control of or access to the land is not surrendered by the easement. For example, I might give my neighbor an easement across my house walk for my neighbor's use in gaining access to his house. I am not thereby relieved from my duty to third persons to maintain my walk in

safe condition. Neither could my neighbor prevent me from doing anything on, over or under my walk so long as it did not interfere with his right to use the same as granted by the easement.

Respondent's brief is misdirected in the manner in which it refers to obligations of the landlord in landlord-tenant cases. The duty of the landlord is dependent upon the extent to which he has surrendered the right of access to and control of the leased premises and the extent to which the tenant has the exclusive right of possession and control. If, by terms of the tenancy, the landlord has no right of access or control, then the landlord is relieved of many of the responsibilities attaching to an owner of property. On the other hand, depending upon the extent of retained right of access and control, or the duties to repair which he has expressly assumed while retaining no right of access for other purposes, the landlord may be held responsible for the condition of the premises. The whole question hinges upon the extent by which the owner of property has placed it beyond his own power to deal with it. So it is with the owner of land upon which someone else has been granted a right to do something, whether it be a right of passage which is granted under the Right of Way Act of March 3, 1875, or whether it be a right of use under some other contractual arrangement. In the case at bar the United States "owned, had control of and free and unrestricted access to" the lands where the fire started (R. 11).

On page 22 of its brief, the Government states:

"It is settled that, in the absence of a contract specifying the duties and obligations of the domi-

nant and servient owner with respect to the easement, the holder of the servient estate is under no obligation, either to the dominant owner or a third party, to make repairs. Instead, 'the duty is upon the one who enjoys the easement to keep it in proper condition, and, if he fails to do so and injury to third persons results, he alone is liable.' "

That is not a supportable statement of the law insofar as the rights of third persons are concerned. *Reed v. Allegheny County*, 330 Pa. 300, 199 Atl. 187, cited by counsel, is a case in which judgment had been entered against both the dominant and servient owners for injuries resulting from negligent condition of the roadway. In the same action judgment was rendered in favor of the servient owner against the dominant owner on the ground that *as between the two owners* the owner of the dominant estate had the obligation to make repairs. The case was reversed only with respect to the judgment in favor of one defendant against the other defendant with instructions to the lower Court to determine the relationships between those parties as placing the burden of repair upon one or the other, *as between themselves*. The case clearly supports our contention that both the dominant and servient owners may be liable to third parties.

None of the remaining cases cited on page 22 of Respondent's brief is applicable to the case at bar because, with one exception, they relate solely to rights and obligations of the dominant owner and the servient owner *inter sese*, and do not involve rights of third parties. The one exception is *Wells v. North East Coal Co.*, 274 Ky. 268, 118 S.W.2d 555, which holds simply that the

dominant owner is liable to a third party but does not involve the question of liability of the servient owner to a third party.

The law is well established that the owner of the servient estate has the right to use the land over which an easement is granted to the extent such use does not interfere with the enjoyment of the easement.³ Elimination of the combustible material from the right of way would not interfere with the enjoyment of the Railroad's easement. Abatement of unlawful and fire hazardous practices on the right of way would not interfere with the enjoyment of the easement. If the Forest Service had taken steps to see that the conditions and practices on the right of way conformed to the standards of care which the law and statutes of the State of Washington require of a landowner in a forest area, the Railroad Company could not have objected or claimed interference with its easement. It is immaterial so far as Petitioner is concerned or so far as any other third person is concerned, whether the Government has recourse over against the Railroad Company.

The fallacy of Government counsel's contention becomes graphically apparent when one considers that under their theory the owner of timberland could log the timber, leave the slash and debris where it falls, and then escape all responsibility for the condition of the land or the practices thereon simply by granting an easement across that land. That is patently unsound. The owner of land cannot escape his obligations and duty to maintain it in a safe and lawful condition un-

³17 Am. Jur. 993 at 994, 995, Easements §96; 28 C.J.S. 750, 751, Easements §§72 and 73.

less he parts with all right of control or access to the land. Generally, by conveying fee title, a grantor no longer has right of access to or control of the land and therefore is not liable for anything which happens after title passes from him. To some degree the same principle applies where property is leased to another. However, even under landlord-tenant rules, if the landlord retains the right of access to the leased premises, he then remains liable for damages to third persons resulting from a dangerous condition of the premises.

Appel v. Muller, 262 N.Y. 278, 186 N.E. 785;

Paine v. Gamble Stores, Inc., 202 Minn. 462,
279 N.W. 257, 116 A.L.R. 407;

Johnson v. Prange-Geussenhainer Co., 240
Wis. 363, 2 N.W.2d 723;

City of Dalton v. Anderson, 72 Ga.App. 109,
33 S.E.2d 115;

Marzotto v. Gay Garment Co., 11 N.J. Super.
368, 78 A.2d 394;

See also the annotation in 89 A.L.R. 480.

Since the owner of land over which an easement is granted has access thereto and can do anything on the right of way which does not interfere or conflict with the use of the easement, it follows with even greater force than in the landlord-tenant situation that such landowner is liable for damage to third persons resulting from an unlawful and hazardous condition of the land. It does not matter whether the land was in that condition when the Government acquired title thereto or whether the condition was created by the holder of the easement. The Government, as owner, accepted re-

sponsibility for the condition of the land when it first acquired title thereto, and it had years in which to abate the hazardous conditions and practices. Regardless of its rights against the Railroad, the Government as the owner of the fee is still responsible to third parties for the results of its condition.

Even if we accept, for purposes of argument, counsel's statement that the railroad held an easement pursuant to the Right of Way Act of March 3, 1875, 18 Stat. 482, 43 U.S.C. 934, our contentions as to the Government's responsibility and its right of control and access are no less sound. The Respondent relies heavily on *Great Northern Railway Co. v. United States*, 315 U.S. 262, and *Himonas v. Denver & R.G.W.R. Co.*, 179 F.2d 171. Those cases actually support our contentions because they make clear the fact that under the Act of March 3, 1875, the railroad is granted a use right only to the extent necessary to conduct its railroad operations and not to the exclusion of other compatible uses of the right of way. In the *Great Northern* case this Court held that the mineral and oil rights in the right of way area remained in the United States and, by implication at least, that those rights could be enjoyed simultaneously with the use of the right of way for railroad purposes. The *Himonas* case holds that an irrigation ditch or flume could be maintained by others across the right of way and under the railroad tracks and that the railroad could not properly deny such use to adjoining landowners. The 10th Circuit Court of Appeals made a significant observation at page 173 in which it states that the utilization of water for irrigation promotes the prosperity and well being of the public as a

whole and that states have given effect to this public benefit by enacting legislation authorizing condemnation and the means of enjoying water.

This is consistent with the philosophy of our argument that the lands, including the right of way, which were owned by the Government, must be maintained to standards set by the State Legislature for the public good and for the protection and preservation of other property which might be endangered by the fire hazardous conditions and practices complained of.

Each of Several Acts of Negligence Was a Proximate Cause

Respondent's analysis (pp. 36-39) of the proximate cause question confirms our argument. Counsel assume, as they must, though *arguendo*, that the fire started because of negligence. But they term it "abstract negligence," stating that it did not result in the damage. They do not explain how Petitioner's timber got burned if it wasn't from the fire which was negligently started on August 6. Counsel then point to the wind on September 20 as being the cause of the fire and tell us that we don't really complain about how the fire got started in the first place.

To make the point perfectly clear, let us draw a series of pictures, the first of which shows the Forest Service laying a stack of inflammables on Government land while a bunch of boys are playing around it with torches, the next showing the pile catching fire as might be expected, the next showing the Forest Service adding fuel to the fire along a path known to be down wind and leading to Petitioner's timber. Each of the scenes

portrayed is a separate act of negligence and each directly and proximately contributes to and causes the damage. Since each act was committed by the same person it hardly seems fair that each subsequent act should excuse the offender from responsibility for his preceding offense, even if, after the fire starts the offender takes off his woodsman's cap and puts on a fireman's helmet.

Under the conditions described in the complaint we see no valid distinction between actively feeding the fire and standing idly by knowing that there is already plenty of fuel to keep it burning and the proper wind and weather to carry it along the course leading inevitably to stands of virgin timber.

The foregoing is so fundamental that citation of authority would be superfluous. •

“Liability Without Fault” and “Negligence *Per Se*” Distinguished

Counsel attempt to characterize Petitioner's case as one based upon absolute liability without fault, and cite *Dalehite v. United States*, 346 U.S. 15, and subsequent cases in which the Court has ruled that the Tort Claims Act does not subject the Government to liability without fault. Counsel again misdirect their argument.

The *Dalehite* case and others cited at the bottom of page 30 of Respondent's brief,⁴ involved damages which were caused by inherently dangerous articles. In each of those cases the Court found that there was no negligence on the part of Government employees. But had

⁴*United States v. Inmon*, 205 F.2d 681, (CA 5); *Harris v. United States*, 205 F.2d 765 (CA 10).

there been negligence, we believe the results would have been different. In the *Dalehite* case if the explosive fertilizer had been negligently exposed to flame and an explosion followed, the Government would have been liable. In the *Inmon* case if the Government had failed to make an effort to clean up the old firing range and dispose of dud shells, or had failed to fence and post signs around the area, thus being negligent, the Government would have been liable. In the *Harris* case if the Government employees had negligently flown over the adjacent farm lands and sprayed the herbicide directly on those crops the Government would have been liable. However, in each of those cases the Court expressly found no negligence existed.

We do not contend that the combustible matter on the Government lands was an inherently dangerous commodity or that the Government is liable without fault. Our case is one of claimed liability *with* fault, based upon negligence.

The Washington statutes, Sections 5807 and 5818, establish standards of care for landowners practically identical to the standards of care required by common law.⁵ Failure to conform to those standards constitutes negligence.

Government counsel confuse "negligence *per se*" with "absolute liability without fault."

In the case at bar the slash and debris on the Government property was not in itself inherently dangerous. It took something more to make that debris to spring into flame and cause the damage complained of. The

⁵See cases cited in Petitioner's Opening Brief, pp. 47-62.

inflammable material, both on the right of way and the adjoining lands, could have been disposed of by the Forest Service employees and the probability of resultant damage would have been avoided. The Forest Service employees knew that the inflammable material would burst into flame if sparks were introduced into it; knew that the railroad equipment was defective and was being operated in a negligent manner apt to throw sparks into the debris; knew that fire on those lands would imperil and might spread to the forests in the vicinity, and had the power to prevent both the fire hazardous condition and the fire hazardous practices. Yet they failed to do so. That was negligence. The common law, as well as the public policy of the State of Washington as expressed by the Legislature in Sections 5807 and 5818, are to the effect that in forested areas where fire can do extensive damage, it is negligence to permit the accumulation of inflammable material. It is such negligence of which we complain.

Other cases cited on page 30 of the Government brief⁶ involve simply the question of whether servicemen who injured persons were acting in the course and scope of their employment at the time the injury was committed. In the case at bar there is no question as to the Forest Service employees' acts and omissions having been within the course and scope of their employment.

Government Duty Under Contract—Good Samaritan Rule

On pp. 57-61 of their brief, Respondent's counsel dis-

⁶*Williams v. United States*, 350 U.S. 857; *United States v. Campbell*, 172 F.2d 500 (CA 5) Certiorari denied, 337 U.S. 957; *United States v. Eleazer*, 177 F.2d 914 (CA 4), Certiorari denied, 339 U.S. 903.

cuss at length two cases, *German Alliance Insurance Co. v. Home Water Supply Co.*, 226 U.S. 220, 57 L.Ed. 195, and *Moch v. Rennsselaer Water Co.*, 247 N.Y. 160, 159 N.E. 896. Those two cases actually support Petitioner's contentions.

Let us first repeat that Petitioner does not sue upon the contract between the State of Washington and the Forest Service under which the Forest Service undertook to fight and extinguish fires. Our action is in tort for the Government's negligence in the performance of that contract (see Petitioner's opening brief, pp. 64-67).

The *German Alliance Insurance Co.* case was a contract action, the plaintiff there claiming to be a third party beneficiary of a contract by which a private Water Company undertook to supply water to the City of Spartanburg, South Carolina, and to lay and install certain additional pipes and hydrants which the Water Company failed to do. The Court held that no action would lie *ex contractu* because it was obviously the intention of the contracting parties that the Water Company not be obligated to any one other than the City. The Court pointed out certain deficiencies in the complaint in the following language, 226 U.S. 228:

" * * * But if, where it did not otherwise exist, a public duty could arise out of a private bargain, liability would be based on the failure to do or to furnish what was reasonably necessary to discharge the duty imposed. The complaint proceeds on no such theory. It makes no allegation that the defendant failed to furnish a plant of reasonable capacity, or neglected to extend the pipes where

they were reasonably required. Nor is it charged that what the company actually did was harmful in itself or likely to cause injury to others, * * * ”

The amended complaint in the case at bar expressly alleges that the Forest Service failed to do what was reasonably necessary to discharge the duty assumed by the Forest Service under the contract and that what the Forest Service actually did was likely to cause injury to Petitioner and others.

Counsel cite *Moch v. Rennsselaer Water Co.*, *supra*, as one in which the Good Samaritan rule is held not applicable in fire cases. We disagree. In that case Judge Cardozo analyzes the Good Samaritan principle and held it not applicable under the facts in that case because the defendant, who had contracted to supply water to the City of Rennselaer, had not undertaken to act to the point where defendant could be held answerable to those injured by defendant's inaction. In discussing the principle, Judge Cardozo makes the following significant statements, 159 N.E. 898-899:

“ * * * The hand once set to a task may not always be withdrawn with impunity though liability would fail if it had never been applied at all. * * * If conduct has gone forward to such a stage that in action would commonly result, not negatively merely in withholding a benefit, but positively or actively in working an injury, there exists a relation out of which arises a duty to go forward. * * * The query always is whether the putative wrongdoer has advanced to such a point as to have launched a force or instrument of harm, or has stopped where inaction is at most a refusal to become an instrument for good. * * * ”

Judge Cardozo then expressly eliminates from consideration in the *Moch* case, an element which is one of the controlling factors in the case at bar, as follows:

"We put aside also the problem that would arise if there had been reckless and wanton indifference to consequences measured and foreseen." (Italics supplied)

The Forest Service affirmatively took charge of the fire fighting operations and induced reliance upon its role as commander and was thus in a position where it could cause harm by not conducting itself prudently. By failing to use sufficient available men and equipment and by doing practically nothing for forty days while the smoldering area continued to imperil nearby timber, the Forest Service employees manifested reckless and wanton indifference to consequences measured and foreseen.

New York Court of Claims Act

Respondent's counsel devote pages to two New York decisions⁷ involving that State's Court of Claims Act. They are not applicable.

Both the *Hughes* and the *Steitz* cases involved asserted negligence of municipalities which maintained fire departments for the benefit of the public at large, and not for the special benefit or protection of the city's property. In the case at bar the Forest Service did not maintain a fire department at all, and its activities were undertaken, associated with and for the direct and special benefit of Government-owned timber held and

⁷*Hughes v. State*, 252 App. Div. 263, 299 N.Y.S. 387, and *Steitz v. City of Beacon*, 295 N.Y. 51, 64 N.E.2d 704.

operated for pecuniary gain and profit (See Petitioner's Opening Brief, pp. 35-41).

Moreover, the New York decisions place repeated emphasis upon the *public* and *governmental* character of city fire departments, an element which this Court, in *Indian Towing Company v. United States*, explicitly rejected as not pertinent in testing for liability under the Federal Tort Claims Act.⁸

Both the *Hughes* and the *Steitz* decisions stress the absence of any duty owed by the municipalities to the plaintiffs as reasons for non-liability and point out that while cities are required to maintain fire departments, there is no requirement as to the degree or character of service rendered nor as to the extent of the fire fighting facilities. In the instant case the Forest Service owed a duty as a volunteer, under common law and statute as a landowner, and under contract (See Opening Brief, pp. 44-72). The *Hughes* case is further inapplicable because plaintiff there sought to hold the State liable for the negligence of one of its municipalities. The New York Court expressly pointed out, 299 N.Y.S. 391, that the State is not responsible for the negligence or malfeasance of its officers or agents except when such liability is voluntarily assumed by the Legislature. The *Hughes* case failed completely in establishing a duty on the State, even though it was arguable that the negligent municipality had a duty. Government counsel significantly omit from their quotations the following pertinent language which appears, 299 N.Y.S.391:

⁸It is noteworthy that two of the six Judges participating in the *Steitz* decision, in their dissent, subscribed to the reasoning adopted by this Court in *Indian Towing* in believing that the "governmental" nature of fire department activities is immaterial.

“Counsel for claimant urges that the duty of furnishing adequate fire protection to its citizens is a State function. No authority is cited to support such a startling proposition nor has our own investigation disclosed any.”

It was with reference to this contention that the New York Court observed, as quoted on page 68 of Respondent's brief, that no moral or legal obligation rested on the State to furnish such protection.

Analysis discloses an apparent conflict in the New York cases involving negligence in the performance of governmental functions. The *Hughes* and *Steitz* cases are bottomed in large measure upon immunity from negligence in the performance of governmental functions. Other cases have imposed liability under such circumstances. See, *e.g.*, *Holmes v. County of Erie*, 266 App.Div. 220, affirmed 291 New York 798, 53 N.E.2d 369, where the County was held liable to an inmate of the penitentiary for negligence of County employees, and *Williams v. City of New York*, 57 N.Y.S.2d 39, where the City was held liable for injuries resulting from negligent maintenance of a fire house. It is sufficient to say that this Court has repeatedly held that the public or governmental character of the negligent act is immaterial (See opening brief, pp. 41-43).

Conclusion

For the reasons stated in Petitioner's Opening Brief and in this Reply Brief, we respectfully ask the Court to reverse the order and judgment of the Courts below.

Respectfully submitted,

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